TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 941.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

S. H. WARD, J. E. WARD, AND HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

IN ERROR TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED SEPTEMBER 24, 1910.

(24,210)

(24,910)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 241.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

J. H. WARD, J. R. WARD, AND HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

IN ERROR TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1916.

a CLERK'S OFFICE:

Court of Civil Appeals, Austin, Texas.

Be it remembered that at a term of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, begun and holden in the City of Austin, Texas, on the First Monday in October, A. D. 1913, the following among other proceedings were had to-wit:

June 24th, 1914.

No. 5282.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY et al., Appellants,
vs.
J. H. WARD et al., Appellees.

Appeal from District Court of Llano County.

Judgment affirmed.
Said Term ending on the First Monday in July, A. D. 1914.

1 STATE OF TEXAS,
County of Llano:

At a term of the District Court, begun and holden at Llano, Texas, within and for the County of Llano, before the Hon. Clarence Martin, and ending on the 24th day of May, 1913, the following case — on for trial, to-wit:

J. H. & J. R. WARD, Plaintiffs,
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al., Defendants.

In the District Court of Llano County, Texas, Fall Term, A. D. 1912.

No. —.

J. H. & J. R. WARD
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

Plaintiffs' Original Petition.

To the Honorable District Court of said County:

J. H. and J. R. Ward, plaintiffs, complaining of Houston and Texas Central Railroad Company, Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, defendants, respectfully represent: That plaintiffs reside in

Llano County, Texas; that the defendants are railroad corporations, duly incorporated, and neither of them has a president, secretary or treasurer residing in said Llano County; that the defendant Houston and Texas Central Railroad Company has a station and office at Llano, in said Llano County into which its line of railroad runs, and E. W. Tarrence, who resides in said Llano county, is its local agent, and is in charge of its said station and office, and of its transportation at Llano; that the defendant Missouri, Kansas & Texas Railway Company of Texas has no local agent in said Llano county, but has one, whose name is to plaintiffs unknown, who resides in Austin, Travis County, Texas, and who is in charge of said defendant's station and office, and of its transportation in said Austin, into which its line of railroad runs; that the defendant Missouri, Kansas & Texas Railway Company has no local agent in said Llano County, but has

2 one, whose name is unknown to plaintiffs, who resides in Denison, Grayson County, Texas, and who is in charge of said defendant's station and office, and of its transportation in said Denison, into which its line of railroad runs.

That heretofore, to-wit: on the 23rd day of August, A. D. 1912, the defendants owned and possessed certain lines of railroad, which together formed a connecting, through and continuous line of railroad from Llano, in said Llano County, via Elgin, in Bastrop county, and Denison, in said Grayson county, to Wynona, in the state of Oklahoma; that said defendants were then, have ever since been, and are now engaged in the business, as common carriers, of running railroad cars, and transporting freight, live stock and passengers over their aforesaid lines of railroad for hire from said Llano, Texas, to Wynona, Oklahoma, and other points in that vicinity; and that the said defendants Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company were then, have ever since been and are now, so engaged and associated together and doing such business as partners.

That on or about the 23rd day of August, A. D. 1912, plaintiffs were the owners of about 296 head of cattle, consisting of 245 steer yearlings and 51 cows, all in good flesh, health and strength, and in such condition, on said last named date, delivered said cattle to and same were received by, the defendant, Houston & Texas Central Railroad Company, at its shipping pens at Llano, Texas, for shipment to said Wynona, Oklahoma, there to be put upon pasturage and fattened for market, and said cattle were then and there carefully and comfortably loaded into seven cars furnished by said defendant for that purpose, and were routed over the lines of the defendants via Elgin and Denison to said Wynona; that said cattle were transported by said defendant Houston & Texas Central Railroad from Llano to Elgin, and from thence to Wynona by the other two of said defendants.

That by reason of the premises, in consideration of the

3 through rate of freight thereupon agreed to be paid, and which was paid as agreed, it was the duty of the defendant Houston & Texas Central Railroad Company to receive and transport said cattle from Llano to Elgin, and there deliver same to its next connecting carrier with reasonable diligence and ordinary care; and

it in turn became the duty of said other defendants Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, to receive said cattle at Elgin and transport them from thence to Wynona and there to make delivery of same with reasonable diligence and ordinary care, and said defendants, respectively, so agreed and promised to do.

The distance from Llano to Wynona is as follows: from Llano to Elgin 128 miles; from Elgin to Denison, via Fort Worth, 275 miles; from Denison to Muskogee 167 miles; and from Muskogee to Wynona 103 miles; aggregating a distance of 663 miles; and that thirty-four hours was a reasonable time in which to have transported said cattle from Llano to Wynona, and there to make delivery of same, and such time is about the usual and ordinary time consumed in making such shipments; and a reasonable time to have been made by each of said defendants, and the usual and ordinary time made by them in making such shipments is about twenty miles per hour including all stops, that said cattle were rendered and received at said initial point for shipment in the morning of the 23rd day of August, A. D. 1912, at 11:30 o'clock, and said cattle were started, at about twelve thirty o'clock of the same day, on their journey, and if they had been transported and delivered with reasonable diligence and ordinary care they would have been delivered at destination, in good condition, in about thirty-four hours after their departure, but same were not so delivered at destination until 9:30 o'clock P. M. on the 26th day of August, A. D. 1912, about eighty-two hours after the journey began, consuming about forty-eight hours beyond what was a reasonable time to make such shipment.

That said defendants and each of them, having full notice and knowledge of the purpose for which said shipment was made
4 did not transport and deliver said cattle with ordinary care or reasonable diligence, but, on the contrary wrongfully and negligently acted in the premises, and delayed said cattle in transportation, and so carelessly, negligently and roughly handled the same that they were jammed, thrown from their feet and over and against the walls and floors of the cars; that said defendants, and each of them, carelessly and negligently failed to keep in good repair their cars and engines; said cars having no bull boards up and doors of same being very defective with no latch at bottom and that said defendants caused said cars to be carelessly and negligently switched, bumped and jerked; that at the initial point, all along the route, and at the point of destination, said defendants, and each of them carelessly and negligently switched and jammed said cars and the cattle therein and delayed the transportation thereof by slow runs and stops, especially at Llano, Fairland, Bertram, Austin, Elgin, Hillsboro, Denton, Denison, Kiawa, McAlester, Muskogee, Tulsa, Osago and Wynona and at various and sundry points between said stations, the names of which are unknown to plaintiffs, and unloaded said cattle at Fort Worth and Muskogee, to their great detriment and injury; that said defendants unloaded said cattle at Muskogee for feed at an extra cost of twenty-eight dollars, to plaintiffs, for same; that said defendants, and each of them, were guilty of other careless and

negligent acts and omissions, the exact nature and location of which was unknow- to plaintiffs; that plaintiffs cannot more specifically state the facts concerning the wrongful, careless and negligent acts and omissions of said defendants, but all of such facts are well known to said defendants and are particularly within their knowledge; and plaintiffs further allege that while en route, the exact place not being known to these plaintiffs, but known to defendants, defendants, by and through their agents, servants and employees so carelessly and recklessly managed and controlled their train as to cause most of the cattle in said train to be knocked from their feet and against the sides of the cars and onto the floor of said cars, crippling and maiming a great many of said cattle, many of which had their horns knocked off by reason thereof, and on reaching their destination they were sore, stiff, drawn crippled, gaunt, emaciated and debilitated; and that by reason of said wrongs and injuries to said cattle committed by defendants, in the transportation thereof, one head died in transportation and 5 head died immediately after reaching their destination from the effects of said injuries and careless treatment committed by the defendants, their agents, servants and employees in the transportation of said cattle; and those that were not killed were caused to lose in flesh, thrift and vitality, and were rendered stale in appearance, weak and thriftless to such an extent that they were unable to thrive and acquire flesh when placed upon abundant food and water, whereby plaintiffs sustained damages as follows: $26.00 per head for the six (6) head that were killed and died from the effects of said injuries, proximately caused by the negligence of the defendants, their agents, servants and employees; $6.00 per head damage to the remaining 239 head of steers; $11.00 per head damage to the 51 head of cows, and $28.00 for extra feed bill paid by plaintiffs at Muskogee, Oklahoma, aggregating the sum of $2279.00, for the recovery of which this suit is brought; that if said cattle had been received, transported and delivered by said defendants with ordinary care and reasonable diligence, none of the loss and damage aforesaid would have been sustained by plaintiffs, but the market value and the intrinsic value of said steers which were killed and died would have been at Wynona, Oklahoma, at the time and in the condition they would have been delivered there, $26.00 per head, as would have been the value of all of the others of said steers, and the market value and the intrinsic value of the remainder of said cattle would have been at least $11.00 per head more than it was at the time and in the condition they were delivered there.

By reason of the premises, the defendants, and each of them became liable and bound to pay plaintiffs the damages sustained by them as aforesaid, with interest thereon from the 23rd day of August A. D. 1912, at the rate of six per cent per annum.

Premises considered, plaintiffs pray that defendants be cited in terms of the law to answer this petition and that upon a final hearing hereof they have judgment against said defendants for said sum of $2279.00 with interest ther-on from the 23rd day of August, A. D. 1912, at the rate of six per cent per annum and all costs of suit to be apportioned between the defendants as

cording to their respective liability, and for such other and further relief as plaintiffs may show themselves entitled to at law or in equity.

——— ———,
Attorney for Plaintiffs.

Indorsed on back as follows: J. H. and J. R. Ward vs. Houston & Texas Central Railroad Company, et al. Plaintiffs' Original Petition. Filed Nov. 12, 1912, S. E. Hargon, Clerk Dist. Court, Llano Co. Texas.

District Court, Llano County.

No. 1858.

J. H. & J. R. REED
vs.
HOUSTON & TEXAS CENTRAL.

Answer of Defendant, Houston & Texas Central Railroad Co.

Now comes the defendant the Houston & Texas Central Railroad Company, and excepts to the plaintiff's petition filed herein and says that the same shows no cause of action against this defendant and of this it prays the judgment of the Court.

W. B. BARRETT,
Attorney for said Defendant.

For answer herein, if need be, this defendant denies all and singular the allegations in the plaintiff's petition contained, in the manner and form as therein stated and of this it puts itself upon the country.

For further answer herein, in need be, this defendant says that it is in no way liable to the plaintiffs for any damages which they may have sustained by reason of the handling and transportation of their said cattle, for the reason that this defendant received said cattle at Llano, under a written contract by which it was especially stipulated that this defendant was only to transport said cattle from Llano to Elgin, Texas, and there to deliver the same to the plaintiffs or, under their direction to its connecting carrier the Missouri, Kansas and Texas Railway Company of Texas, a co-defendant herein. This defendant says that by virtue of the terms of said written contract it was specially stipulated that this defendant was not to transport and deliver said shipment of cattle at the end of its line within any specified time, nor to be delivered at any particular hour and this defendant says that said cattle were handled by it from Llano to Elgin in the exercise of ordinary care and the same were handled on regular scheduled trains and delivered at the end of this defendant's line with all reasonable dispatch and was delivered to the plaintiffs or under their direction to the said co-defendant at Elgin, in good and perfect condition and this defendant was guilty of no act of commission or ommission that

7

in any way caused or contributed to any loss or damages that the plaintiffs may have sustained.

Having fully answered this defendant prays to be discharged with its costs.

W. B. GARRETT,
Attorney for said Defendant.

Indorsed on back as follows: No. 1858, J. H. & J. R. Ward vs. Houston & Texas Central Railroad Company et al. Answer of defendant Houston & Texas Central Railroad Co., filed May 8, 1913, S. E. Hargon Clerk Dist. Court, Llano Co. Texas.

In the District Court, Llano County, Texas, Spring Term, A. D. 1913.

No. 1858.

J. H. and J. R. WARD
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

First Amended Original Answer of Defendants M., K. & T. Ry. Co. of Texas.

To said Honorable Court:

Comes now the Missouri, Kansas & Texas Railway Company of Texas, one of the defendants in the above styled and numbered cause, and with leave of the court first had and obtained, filed this its first amended original answer, in lieu of and as a substitute
8 for its original answer hereto filed herein, and says:

1. This defendant demurs and excepts generally to the allegations of plaintiffs' petition, and says that same are wholly insufficient in law and present no cause of action against this defendant, and of this it prays the judgment of the Court.

2. And further answering herein, this defendant denies the allegations of plaintiffs' petition, all and singular, and of this puts itself upon the country.

3. And without waiving, but expressly relying upon, the foregoing general denial and general demurrer, this defendant sets up the following by way of special answer to said petition, and says:

And further answering herein, this defendant says that at no time mentioned in plaintiffs' petition, nor at any time thereafter, was this defendant, nor is it now, a partner of its co-defendants specifically denies each and every allegation of plaintiffs' petition wherein such partnership is alleged, or wherein any state of facts exists, or existed, which would make this defendant jointly liable for any of the acts or ommissions, if any, of its said co-defendants herein.

THE STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, on this day personally appeared R. W. Rigdon, to me well known, who having been by me first duly sworn, upon his oath states that he is the Traffic Claim Agent of the Missouri, Kansas & Texas Railway Company of Texas, and is authorized to make this affidavit, and that the facts sets forth in the foregoing paragraph, denying partnership and joint liability, are, within the knowledge of affiant, true.

R. W. RIGDON,
Traffic Claim Agent.

Sworn to and subscribed before me by the said R. W. Rigdon, on this, the 25th day of November, A. D. 1912.

[L. S.] HOUSTON WOOD,
Notary Public, Dallas County, Texas.

9 (*b*) This defendant further alleges that if it received said shipment, it received and accepted same under a contract or bill of lading in writing executed by this defendant, through its agent B. E. Crawford, and executed by the plaintiffs herein, by their duly authorized agent E. A. Barrer,—the original of which said bill of lading is attached to this answer, marked "Exhibit A," and hereby prayed to be made a part hereof for all purposes.

That the plaintiffs herein had a choice of rates in making said shipment, which rates were duly filed with the Interstate Commerce Commission, and were in force at the time of said shipment; and the rate upon which said shipment was made was a special rate and less than the regular rate for shipments between said points where the carrier assumed general liability in connection with shipments of live stock between said points, and said contract or bill of lading was executed and said shipment received and carried under said special rate.

That under and by virtue of said bill of lading or contract that shippers were bound to load, unload, feed, water, and care for said stock en route, and that if plaintiffs' cattle were in any way damaged, it was due to the failure on their part and their agents to properly load, unload, feed, water and care for said stock en route,—for which this defendant is in no sense liable.

This defendant further says that under said contract or bill of lading it is expressly stipulated and provided as follows: "The shippers shall within thirty (30) days after the happening of the injuries or delays complained of, file with some freight or station agent of the carrier on whose line the injuries or delays occurred his written and duly verified claim therefor, giving the amount. Shippers failure to comply in time and manner with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries or delays to said live stock as aforesaid, and no suit shall be brought against any carrier except against the carrier on whose line the injuries or delays occurred, and no damages can be recivered ex-

cept those set forth in the required written notice and claim
10 aforesaid and in no greater amount than claimed in said notice") And this defendant says that no claim or notice as provided for in said bill of lading was filed with this defendant or any of its agents within thirty days after the alleged injuries; and therefore, whatever, if any, claim the plaintiffs may have had against the defendant, it is wholly barred.

And this defendant further says that if it handled said shipment, it handled same only from Elgin, in Bastrop County, Texas, to Denison, in Grayson County, Texas, and is not liable under the stipulations of said bill of lading for any injuries or damages to said stock which may have occurred prior to its receipt of said stock at Elgin, Texas, or after its delivery of same at Denison, Texas, to its connecting carrier.

And this defendant further says that said contract or bill of lading further provided that in consideration of said special rate no live-stock should be shipped which exceed in value the following prices per head, viz: Each ox, steer or bull, $50.00; each cow, $25.00; each calf, $10.00; and that said shipper represents and agrees that his *live said* stock do not exceed in value said prices, and in case of any loss or damage thereto by carriers' negligent transportation or handling of said cars, as aforesaid, it is mutually agreed in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, that shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation above shown; and this defendant says that by virtue of the said stipulation in said contract or bill of lading the damages are limited to the actual damage, if any, caused by the negligence, if any, of this defendant, and in no case to exceed the valuation aforesaid.

And this defendant further says that the said shipment constituted and was an interstate shipment, originating in Llano, Llano County, Texas, and destined to Wynona, in the State of Oklahoma, and constituted and was interstate commerce, and the said pro-
11 visions of said bill of lading were and are, each and all valid and binding upon the laws of Congress relating to interstate commerce in force at the time said bill of lading was executed and said shipment made.

Wherefore, this defendant prays that Plaintiffs ought not to recover, and of this it puts itself upon the country and asks that it go hence without day and recover its costs.

FISET & McCLENDON,
Attorneys for Defendant, Missouri, Kansas & Texas Railway Company of Texas.

Indorsed on back as follows: No. 8158 J. H. & J. R. Ward vs. H. & T. C. R. R. Co. et al 1st Amended Original Answer of Deft. M. K. & T. Ry. Co. of Texas Filed May 8, 1913, S. E. Hargon, Clerk Dist. Court Llano Co. Texas.

Shippers will please read this Contract carefully, as changes have been made from form heretofore used.

The Missouri, Kansas & Texas Railway Co. of Texas.

Rules and Regulations for the Transportation of Live Stock.

Notice.

This Company has two rates and forms for contracts on live stock. Ordinary Live Stock transported under this special contract is accepted and hauled at rate named below at owners' risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be less than published tariff rate applying thereon when transported at carrier's risk. All kinds of Live Stock, Carrier's Risk, will be taken under the provisions and at rates provided for by existing tariffs and classification.

Special Live Stock Contract No. 66.

Executed at Elgin, Texas Station Aug. 23, 1912.

This Agreement, entered into by and between the Missouri, Kansas & Texas Railway Company of Texas, and each carrier adoptins it, hereinafter called the carrier, party of the first part, and J. H. Ward hereinafter called the shipper, party of the second part, this 23rd day of Aug. 1912, Witnesseth:

12 The carrier agrees to let to the shipper 7 stock cars numbered — which the shipper has selected and desires to use for the shipment of 122 head of cattle, and to haul said cars consigned to J. H. Ward at Wynona, when loaded and delivered to carrier together with the shipper, party or parties in charge thereof, from

Elgin (Do not insert any station beyond our line) to Winona (Do not insert any station beyond our line)

all as heretofore provided at the rate of — dollars per acre, or — cents per hundred pounds, from —— —— to destination, subject to minimum weights and length of cars provided for in tariff, the same being a Special Rate, which the carrier guarantees, and less than the regular tariff rate applying on shipments of live stock not covered by this Special Contract.

It is mutually agreed that if the destination of the aforesaid cars be on the line of the Missouri, Kansas & Texas Railway of Texas, then The Missouri, Kansas & Texas Railway Company of Texas agrees to deliver same to consignee after payment of charges and surrender of this contract, but if the destination of such cars be beyond the line of The Missouri, Kansas & Texas Railway of Texas, then, The Missouri, Kansas & Texas Railway Company of Texas, agrees, and it, and each connecting carrier in turn, is hereby authorized to deliver said cars to its connecting carrier for transportation under the terms, stipulations, limitations and agreements herein contained, and each and every carrier receiving said cars for transporta-

tion shall be deemed to adopt the terms and conditions hereof and assumes the like liabilities and shall be entitled to all the provisions exemptions from and limitations of liability and other stipulations governing the measure and adjustments of damages herein contained; it being understood and agreed that the duty and liability of The Missouri, Kansas & Texas Railway Company of Texas and that of every other carrier transporting said cars hereunder, absolutely ceases and terminates upon the delivery by it of said cars to its connecting carrier.

13 In consideration of said Special Agreement by the carrier, it is further mutually agreed and stipulated as follows:

1. The shipper agrees to select no car for transportation of his live stock which is not in a suitable condition therefor, but the carrier shall, upon demand made by the shipper either before delivery to it for transportation, or while in transit, make any needed repairs at its cost.

2. The shipper shall load, unload and reload said cars and see that the same are securely fastened, and shall feed and water said live stock and attend to them while in carrier's stock yards, pens or said cars at his own cost and expense, but the carrier, agrees to allow said shipper free use of its pens and chutes. The shipper shall leave said pens and chutes in like condition — which he finds them.

3. The carrier shall stop said cars at any of its stations where it has facilities for watering and feeding whenever requested to do so in writing by the shipper, the shipper agrees that he will not confine said live stock for a period longer than thirty-six consecutive hours without unloading the same for rest, water and feeding for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes, and the character of the cars used will not permit of their being properly feed and watered therein, and the carrier agrees to have its pens — arranged as to allow him to do so.

4. The shipper shall, upon the arrival of the cars at destination and delivery to him, unload said stock and surrender said cars in the like condition which he found them, except as against acts of the carrier.

5. The carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shipper for any purpose, and the shipper shall bear all damages resulting from his negligent doing, or failure to do, any of the things which he hereby contracts to do, or from the negligence of any of his servants.

14 6. The shipper is in no sense an agent, employe or servant of the carrier, but is his own master in and about the matters and things by him to be performed under this contract, and he shall furnish all his own employes for doing everything which he hereby contracts to do and which he cannot do personally and the carrier shall be liable for no act nor omission of the ship-

per, nor his servants, nor for the acts of any of carrier's servants at the request or for the advantage of shipper, but said servants of the carrier shall for the time be considered employes of the shipper. The carrier, however, agrees to make no charge for the time of such servants. In no case shall the carrier be required to carry more employes of shipper including shipper, than endorsed on the back hereof, and none except those whose names are written hereon.

7. The shipper or party or parties in charge of said cars will only be carried on the train drawing said cars, in accordance with the rules on the back hereof and the failure to observe such regulations shall be an absolute bar to any right to recover damage for any injury or deaths resulting from such failure to observe the same. And he and they and each and every of them, who shall receive any injuries by reason of the negligence of the carrier, or otherwise, shall have no right of action therefor, unless notice in writing of the claim for damages on account of such injury be given the nearest, or any other convenient local agent of the carrier, or the General Superintendent of said Railway Company at Dallas, Texas, within ninety-one days of the date of the injury. Such notice must state the time, place and particulars of the injury and the nature and extent of the damages, and no other or further damages can be recovered than those set forth in this notice.

8. The carrier does not ship live stock or Emigrant Outfit under this contract or at the rate herein given which exceed in value the following prices per head::

Each horse (gelding, mare, stallion) mule or jack	.....	$100.00
Each Pony or range horse	.....	30.00
Each ox, steer or bull	.....	50.00
15 Each Cow	.....	$50.00
Each calf	.....	10.00
Each Hog	.....	7.00
Each sheep or goat	.....	3.00

Emigrant Outfit (not Live Stock) consisting of emigrant Movables, Household Goods, Second-hand Farm Machinery, etc., when loaded with live stock as per classification at valuation of not to exceed $5.00 per one hundred pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation or handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, that shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above.

9. The shipper shall furnish reports, signed by himself and all parties in charge of said live stock, to the conductor of the train at the end of each division of carrier's line, as to the condition of live stock, and the shipper shall be estopped from denying the truth of such reports; and his or their failure to furnish such reports

shall be conclusive evidence that said live stock were in good condition. The shipper further expressly agrees that as a condition precedent to his right to recover any damages for loss or injury to said live stock while in the possession of the carrier, he will give notice in writing of the injury to the conductor in charge of the train or to the nearest station agent or freight agent of the carrier on whose line the injury occurred, before said cars leave that carrier's line or before the live stock are mingled with other live stock or removed from pens at destination. In his written notice, he shall state the place and nature of the injury to the end that they may be fully and fairly investigated. The shipper further
expressly agrees that as a condition precedent to his right
16 to recover for any loss or damage resulting from shrinkage in weight, decline in market, yardage and feed bills and all other damages caused by the negligent delay or delays of the carrier, he will give notic in writing, duly verified by affidavit, to the nearest station or freight agent of the carrier on whose line the injuries or delays resulting in such damages occurred, within five (5) hours after said stock are sold or loaded for reshipment, as the case may be. If the owner does not accompany said stock, the person who accompanies the same for him shall be his agent to give said written notice, verified by affidavit, and if neither said owner *now* anyone for him accompanying said stock, then the consignee is hereby constituted his agent for the purpose of giving said written notice. To the end that any claim may be fully and fairly investigated, there shall be stated in the written and verified notice the place and nature of the injuries and extent thereof, the shrinkage in weight, the decline in market, the extra amounts paid for feed, yardage, or any other loss or damage, and the disposition of the stock, and if sold, the person to whom sold. The shipper shall within thirty (30) days after the happening of the injuries or delays complained of file with some freight or station agent of the carrier on whose line the injuries or delays occurred, his written and duly verified claim therefor, giving the amount. Shipper's failure to comply in time and manner with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries or delays to said live stock as aforesaid, and no suit shall be brought against any carrier, except against the carrier on whose line the injury or delay occurred, and no damages can be recovered except those set forth in the required written notice and claim aforesaid and in no greater amount than claimed in said notice. No suit shall be maintainable unless instituted within ninety-one (91) days after the happening of the injuries, delay or delays complained of, any statute of limitation to the contrary notwithstanding.

10. As a further consideration for the reduced rate herein given,
the shipper hereby releases and waives any and all causes
17 of action for damages by reason of any written or verbal contract for the shipment of said live stock or any of them prior to the execution hereof, and will hold the carrier harmless for any and all claims for injuries to persons accompanying said live

stock as aforesaid, resulting from carrier's or employe's negligence, or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof, or any expenses it may be put to or damages it may be required to pay, by reason of the introduction of said live stock into a country or State against the quarantine or other laws of the United States or of any State, people or community.

No Agent of this Company has any authority to waive, modify or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or to furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do.

Executed in duplicate the day and date aforesaid.

THE MISSOURI, KANSAS & TEXAS RAILWAY CO. OF TEXAS,

(Signed) By B. E. CRAWFORD, *Agent.*
E. A. BARRER, *Shipper.*

Witnesses:
(Signed) A. M. DAVIDSON.
(To be other than either party hereto.)

"Exhibit A."

Indorsed on back as follows:

NOTICE.—This pass must be carefully filled out by the Agent at destination, when presented by parties who accompanied the live stock and who are entitled to return pass according to Tariffs, after plainly writing across the face of the contract "Delivery Effected."

Drover's Pass.

Issued by The Missouri, Mansas & Texas R'y Co. of Texas.

Pass Ed. Baker, Wynona, Okla., Elgin, Texas, from destination of live stock to point if origin. This pass is not transferable,
18 and must be presented to the train conductor for continuous passage within 24 hours after the date and hour of issue.

J. J. WEST,
General Freight Agent, Dallas, Texas.

Date of Issue 8/23, 1912. Hour of — M.

Witness,
W. L. McDOWEELL.

Countersigned:
R. D. COPELAND,
Agent the M., K. & T. Railway Company of Texas or Delivering Line.

This pass must be written in ink, otherwise it will not be valid.

NOTICE.—As a means of identification the agent issuing this pass will require each person to write his name in the space below, and will cancel the lines not required, by drawing a pen through them. If this pass is found in the hands of any person other than those whose names are written below, the conductor will take up and collect full fare. Any person accepting or riding on this free pass thereby and hereby agrees to assume all risks to person or baggage except for wilful or active negligence of the carrier.

——— ———.

(The persons above named must sign the pass before it will be accepted for passage.)

For Identification Signature.

B. K. Rupert 536 8/26 504 to A 245.

Instructions to Agents.

The published Tariffs of this Company contain provisions for the transportation of men in charge of live stock and the free return of them, and this blank form must not be used except as authorized by the Tariffs. When free return transportation is nor authorized by Tariffs the blank spaces under the head of "Drover's Pass" must be cancelled by agent who issues contract drawing lines in ink through them.

NOTE.—Agents will make contracts in duplicate, giving one to shipper, keeping the other on file at their station until this book is all used—Stubs should then be sent to the General Freight Agent, Dallas, Texas.

19 No. —.

The Missouri, Kansan & Texas R'y Co. of Texas.

—— Station —— —, 191–.

Live Stock Contract.

The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identity themselves whenever required to do so by any conductor. A failure on his or their part to observe the same shall be an absolute bar to any right to recover damages for any injuries, resulting in death or otherwise therefrom.

1. Remain in the caboose attached to the train drawing said cars while the train is in motion.
2. Get on and off said Caboose while the same is still.
3. Get on or be on no freight or other cars while switching is being done at stations.

4. Will not walk or stand on any track at stations or other places at night without a lantern.

5. In consideration of this free return transportation, I hereby agree that in case of any accident, wreck, mishap or other casualty, in which I may or shall receive any personal injury, I will notify the Railway Company in writing through my home agent, or other nearest or most convenient Local Agent of the Railway Company, or the General Superintendent of said Railway Company at Dallas, Tex., of such injury, and of the time, place, circumstances and extent thereof, and in default of my so doing within 91 days after the happening of such injury, I hereby agree to waive any and all cause and right of action for or on account thereof. And I further agree that I shall not have any cause or right of action, nor maintain any action, for any injury, except that of which I shall in said notice, as aforesaid, advise the said Railway Company.

6. The Railway Company will receive the usual amount of baggage and check and transport same on its regular passenger trains, but the Railway Company expressly refuses to receive such baggage on trains hauling said stock, as it has no facilities for caring for same, and if the party or parties in charge of stock elect to take any baggage along with them in the caboose or other cars on stock train, they retain exclusive custody and care thereof and assume all risk of loss of same or damage thereto from whatsoever cause arising, including the negligence of the Railway Company and that of its servants and agents, and said parties are warned that the Railway Company will exeecise no care whatever over said baggage on stock trains.

1 .....2 .....3 .....

Employees of Shipper.

Pass on freight train drawing cars set out in contract on reserve side hereof ....., Employees of Shipper.

—— ——, *Agent.*

Special Instructions to Conductors.

You will require all persons presenting the Contract to identify themselves by writing their names on the lines under heading "For Identification Signatures," and compare such signature with the signature as written on lines 1, 2, and 3, under heading "Live Stock Contract," in order to satisfy yourself that the pass is being used by the proper parties.

—— ——,

General Superintendent.

Way Bill.

Car Number.	Initials.	Series.	No.	Tear off from Top Down to No. of Cars in Shipment
				20
				19
				18
				17
				16
				15
				14
				13
				12
				11
				10
				9
				8
				7
				6
				5
				4
				3
				2
				1

Number Cars or Contract

NOTE.—Agents will punch description of party accompanying stock. If shipment consists of more than six cars and more than one attendant accompanies it, the description of each must be punched. If more than three in charge, separate contract should be issued for other parties. Agents not furnished with a punch, will cross out description with ink.

21

On the right hand margin of this form, tear off from The Top Down to the number representing number of cars in the consignment. At the foot of this column tear off From The Bottom Up to the number representing the number of men accompanying shipment on this contract.

Description of party in charge accompanying:

Size. Stout, Medium, Slim.	Height. Tall, Medium, Short.	Hair. Red, Dark Gray, Light.	Beard. None, Full Beard, Side, Chin, Mustache.
1 O OO	O OO	O O O O	OoO O O Colored
2 O OO	O O O	O O O O	Oo OO O White
3 O OO	O O O	O O O O	Oo OO O O C

Number of men in charge. One. Two. Three. Tear off to No. of Men with Shipment

No. 1858.

In the District Court, Llano County, Texas, Spring Term, 1913.

J. H. & J. R. REED
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

First Amended Original Answer of Def't M., K. & T. Ry. Co.

To said Honorable Court:

Comes now the Missouri, Kansas & Texas Railway Company, one of the defendants in the above styled and numbered cause, and with leave of the court first had and obtained, files this its first amended original answer heretofore filed herein, and says:

1. This defendant demurs and excepts generally to the allegations of plaintiff's petition, and says that same are wholly insufficient in law and present no cause of action against this defendant, and of this it prays the judgment of the Court.

2. And further answering herein, this defendant denies the allegations of plaintiffs' petition, all and singular, and of this puts itself upon the country.

22 3. And without waiving but expressly relying upon, the foregoing general denial and general demurrer, this defendant sets up the following by way of specific answer to said petition and says:

And further answering herein, this defendant says that at no time mentioned in plaintiffs' petition, nor at any time thereafter, was this defendant, nor is it now, a partner of its co-defendant herein. The Missouri, Kansas & Texas Railway Company of Texas; and this defendant specifically denies each and every allegation of plaintiffs' petition wherein such partnership is alleged, or wherein any state *or* facts exist, or existed, which would make this defendant jointly liable for any of the acts or omissions, if any, of its said co-defendant herein.

THE STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, on this day personally appeared W. A. Webb, to me well known who having been by me first duly sworn, upon his oath states that he is the Agent and General Manager of the Missouri, Kansas & Texas Railway Company, and is authorized to make this affidavit, and that the facts set forth in the foregoing paragraph, denying partnership and joint liability, are, within the knowledge of the affiant, true.

W. A. WEBB.

Sworn to and subscribed before me by the said W. A. Webb, on this, the 26th day of November, A. D. 1912.

HOUSTON WOOD,
Notary Public, Dallas County, Texas.

(*b*) This defendant further alleges that if it received said shipment, it received and accepted same under a contract or bill of lading in writing executed by the Missouri, Kan*asa* & Texas Railway Company of Texas, through its agent R. E. Crawford, and executed by the plaintiffs herein, by their duly authorized agent E. A. Barrer—the original of which said bill of lading is attached to the amended answer of said Missouri, Kansas & Texas Railway
23 Company of Texas, marked "Exhibit A," and is hereby referred to and prayed to be made a part of this answer for all purposes.

That the plaintiffs herein had a choice of rates in making said shipment, which rates were duly filed with the Interstate Commence Commission, and were in force at the time of said shipment; and the rate under which said shipment was made was a special rate and less than the regular rate for shipments between said points where the carrier assumed general liability in connection with shipments of live stock between said points, and said contract or bill of lading was executed and said shipment received and carried under said special rate.

That under and by virtue of said bill of lading or contract the shippers were bound to load, unload, feed, water and care for said live stock en route, and that if plaintiffs' cattle were in any way damaged, it was due to the failure on their part and their agents to properly load, unload, feed, water, and care for said stock en route,—for which this defendant is in no sense liable.

This defendant further says that under said contract or bill of lading it is expressly stipulated and provided as follows: "The shippers shall within thirty (30) days after the happening of the injuries or delays complained of, file with some freight or station agent of the carrier on whose line the injuries or delays occurred his written and duly verified claim therefor, giving the amount. Shippers' failure to comply in time and manner with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries or delays to said live stock as aforesaid, and no suit shall be brought against any carrier except against the carrier on whose line the injuries or delays occurred, and no damages can be recovered except those set forth in the required written notice and claim aforesaid and in no greater amount than claimed in said notice.

And this defendant says that no claim or notice as provided for in said bill of lading was filed with this defendant or any of its agents within thirty days after the alleged injuries; and, therefore,
24 whatever, if any, claim the plaintiffs may have had against this defendant, is wholly barred.

And this defendant further says that if it handled said shipment, it handled same only from Denison, in Grayson County, Texas, to Wynona, in the State of Oklahoma, and is not liable under the stipulations of said bill of lading for any injuries or damage to said stock which may have occurred prior to its receipt of said stock at Denison, Texas, or after its delivery of same at Wynona, Oklahoma to said plaintiffs.

And this defendant further says that said contract or bill of lading further provides that in consideration of said special rate no livestock should be shipped which exceed in value the following prices per head, viz; Each ox, steer or bull, $50.00; each cow $25.00, each calf $10.00; and that said shipper represents and agrees that his said livestock do not exceed in value said prices and in case any loss or damage thereto by carrier's negligent transportation or handling of said cars, as aforesaid, it is mutually agreed in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, that shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation above shown; and this defendant says that by virtue of the said stipulation in said contract or bill of lading the damages are limited to the actual damages, if any, caused by the negligence, if any, of this defendant, and in no case to exceed the valuation aforesaid.

And this defendant further says that the said shipment constituted and was an interstate shipment, originating in Llano, Llano County, Texas, and destined to Wynona, in the State of Oklahoma, and constituted and was interstate commerce, and the said provisions of said bill of lading were and are, each and all, valid and binding under the laws of Congress relating to interstate commerce in force at the time said bill of lading was executed and said shipment made.

Wherefore, this defendant says that plaintiffs ought not to recover, and of this it puts itself upon the country and asks that it go hence without day and recover its costs.

FISET & McCLENDON,
Attorneys for Defendant Missouri, Kansas & Texas Railway Company.

25 Indorsed on back as follows: No. 1858. J. H. & J. R. Ward vs. H. & T. C. R. R. Co. et al. First Amended Original Answer of Def't M., K. & T. Ry. Co. Filed May 8, 1913, S. E. Hargon, Clerk Dist. Court, Llano Co., Texas.

In the District Court of Llano County, Texas, Spring Term, A. D. 1913.

No. 1858.

J. H. and J. R. WARD
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

Judgment of the Court.

And now on this the 8th day of May, 1913, came on to be heard the above styled and numbered cause and came the defendants and asked and were granted leave to file amended answers herein. Thereupon came on to be heard the general demurrers set forth

in the several answers of the several defendants, and the court having heard and considered same and being of opinion that same are not well founded in law it is thereupon by the court adjudged, ordered and decreed that the said general demurrers and each of them be and the same are hereby overruled, to which ruling of the court the defendants *are* each of them *accepted.*

Thereupon came on to be heard the same cause and the plaintiffs and defendants appeared by their respective attorneys of record and no jury being demanded the parties to said cause announced ready for trial and submitted their differences of law an fact to the court and the court having heard the pleadings and the testimony and being of opinion that the plaintiffs are not entitled to recover against the defendants, the Houston & Texas Central Railroad Company and being further of the opinion that the plaintiffs are entitled to recover of and from the defendant, the Missouri, Kansas & Texas Railway Company of Texas the sum of $257.50 together with legal interest thereon from the 26th day of August, 1912, and that plaintiffs are entitled to recover against defendants, Missouri,
26 Kansas & Texas Railway Company, the sum of $630.50 together with legal interest thereon from the 26th day of August, 1912, it is thereupon by the Court, considered, ordered, asjudged and decreed.

(1) That the plaintiffs take nothing by their suit against the Houston & Texas Central Railroad Company but that the said defendants go hence without day and recover of and from plaintiffs herein all costs in this behalf laid out and expended.

(2) That the plaintiffs do have and recover of and from the defendant, the Missouri, Kansas & Texas Railway Company of Texas, the sum of $267.50 together with interest thereon at the rate of six per cent per annum from the 26th day of August, 1912.

(3) That Plaintiffs do have and recover of and from the defendant Missouri, Kansas & Texas Railway Company the sum of $630.50 together with interest thereon at the rate of six per cent per annum from the 26th day of August, 1912.

(4) That the plaintiffs do have and recover of and from the Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company all costs in this behalf laid out and expended saving and except the costs heretofore adjudged against the said defendants Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company be apportioned between said defendants as follows: the general costs adjudged against said defendants to be apportioned equally between said two defendants and the costs incurred by each of said defendants individually to be assessed against the defendant incurring such costs, for all of which let execution issue.

Thereupon the said defendants, the Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company in open court excepted to the said judgment, rulings and orders of the court.

And now on this the 8th day of May, A. D. 1913, came on to be heard the motion for a new trial filed by the defendants, Missouri,

Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company in said cause No. 1858 of J. H. Ward & J. R. Ward against the Houston & Texas Central Railroad Company et al., and the court having heard such motion
27 and being of opinion that same is not well founded in law it is thereupon ordered that the said motion be and the same is hereby in all things overruled, to which action of the court the said defendants and each of them excepted and in open court gave notice of Appeal to the Court of Civil Appeals in and for the Third Supreme Judicial District at Austin and the parties to this cause are hereby granted sixty days from and after the adjournment of this court in which to prepare and have approved and filed their bills of exception and statement of facts in said cause.

In the District Court of Llano County, Spring Term, A. D. 1913.

No. 1858.

J. H. & J. R. WARD
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

Motion for New Trial.

To the Honorable Judge of said court:

Come now the defendant-, the Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company by their attorneys of record and move the court to set aside the judgment in said cause rendered against the said defendants on the 8th day of May, 1913, and to grant a new trial of said cause and to render judgment in favor of these defendants and each of them; and say that the court committed error in each of the matters hereinafter set forth, each and all of which are relied upon as grounds for the motion:

First Assignment of Error.

The court committed error in rendering judgment against the defendants, the Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company because under the pleadings and uncontradicted evidence in said cause, whatever, if any, claim the plaintiffs may have had against said defendants or either of them, was barred and unenforcible in that the plaintiffs had failed to comply with the stipulations in this bill of lading attached as "Exhibit A" to the First Amended Original Answer of the defendant Missouri, Kansas & Texas Railway
28 Company of Texas, providing that the shippers should file within thirty days after the happening of the injuries or delays complained of with some freight or station agent of the said defendants there written and duly verified claim therefor, giving

the amount, which provision of said bill or lading was valid and enforcible under the laws of the United States governing and regulating Interstate Commerce.

Second Assignment of Error.

The Court committed error in rendering judgment against the defendant, Missouri, Kansas & Texas Railway Company of Texas because there was no evidence upon which to base a judgment against said defendant.

Third Assignment of Error.

The Court committed error in rendering judgment against the defendant Missouri, Kansas & Texas Railway Company because there was no evidence upon which to base a judgment against said defendant.

Fourth Assignment of Error.

The Judgment against the Missouri, Kansas & Texas Railway Company of Texas is against the great weight and preponderance of the testimony in that, under the great weight and preponderance of the testimony the evidence is insufficient to base a finding that said defendant was guilty of any act of negligence which directly or proximately caused or contributed to any injury to the plaintiff's cattle involved in this suit.

Fifth Assignment of Error.

The judgment against the Missouir, Kansas & Texas Railway Company is against the great weight and preponderance of the testimony in that, under the great weight and preponderance of the testimony the evidence is insufficient to base a finding that said defendant was guilty of any act of negligence which directly or proximately caused or contributed to any injury to the plaintiff's cattle involved in this suit.

FISET & McCLENDON,
Attorneys for M., K. & T. Ry. Co. of Texas and M., K. & T. Ry. Co.

29 Indorsed on back as follows: 1858. J. H. & J. R. Ward vs. H. & T. C. R. R. Co. et al, Motion for New Trial. Filed May 8, 1913, S. E. Hargon, Clerk Dist. Court, Llano Co., Texas.

In the District Court of Llano County, Texas, Spring Term, A. D. 1913. No. 1858.

J. H. and J. R. WARD
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

Order Overruling Motion for New Trial.

And now on this the 8th day of May A. D. 1913, came on to be heard the motion for a new trial filed by the defendants, Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company in said Cause No. 1858 of J. H. Ward and J. R. Ward against the Houston & Texas Central Railroad Company et al, and the court having heard such motion and being of opinion that same is not well founded in law it is thereupon ordered that the said motion be and the same is hereby in all things overruled, to which action of the court the said defendant- and each of them excepted and in open court gave notice of appeal to the Court of Civil Appeals in and for the Third Supreme Judicial District at Austin and the parties to this cause are hereby granted sixty days from and after the adjournment of this court in which to prepare and have approved and filed their bills of exception and statement of facts in said cause.

In the District Court of Llano County, Texas, Spring Term, A. D. 1913. No. 1858.

J. H. & J. R. WARD,
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

Appeal Bond.

THE STATE OF TEXAS,
County of Travis:

Know all men by these presents: That,

Whereas, in the above styled and numbered cause, wherein J. H. Ward and J. R. Ward are the plaintiffs, and the Houston & Texas Central Railroad Company, the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company are the defendants, same being cause No. 1858 on the docket of the District Court of Llano County, Texas, the said Court on the 8th day of May A. D. 1913, rendered a judgment whereby it was considered, ordered, adjudged and decreed as follows, to-wit:

1. That the plaintiffs take nothing by their suit against the Houston & Texas Central Railroad Company, and that the said defendant go hence without day and recover of and from plaintiffs herein all costs in this behalf laid out and expended.

2. That the plaintiff do have and recover of and from the defendant, the Missouri, Kansas & Texas Railway Company of Texas, the sum of $267.50 together with interest thereon at the rate of six per cent — annum from the 26th day of August, 1912.

3. That plaintiffs do have and recover of and from the defendant Missouri, Kansas & Texas Railway Company the sum of $630.50 together with interest thereon at the rate of six per cent per annum from the 26th day of August, 1912.

4. That the plaintiffs do have and recover of and from the Missouri, Kansas & Texas Railway Compan*t* of Texas and Missouri, *Missouri* & Texas Railway Company all costs in this behalf laid out and expended saving and except the costs hereto against the plaintiffs and that the costs herein adjudged against the said defendants Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company be apportioned between said defendants as follows: the general costs adjudged against said defendants to be apportioned equally between said two defendants and the costs incurred by each of said defendants to be assessed against the defendant incurring such costs, for all of which let execution issue.

And, whereas, the said defendants Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company filed in said court, in due time, their motion for a new trial—which said motion was in all things overruled by said court—and the said defendants excepted to said judgment,
31 rulings and action of said Court and gave notice of appeal to the Court of Civil Appeals of Texas for the Third Supreme Judicial District at Austin, and desires to perfect said appeal and to supercede the said judgment pending said appeal.

Now, therefore. we, the aforesaid Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, defendants as aforesaid and appellants, as principals, and the American Surety Company of New York, as surety, acknowledge ourselves bound to pay unto the plaintiffs J. H. Ward and J. R. Ward and unto the defendant Houston & Texas Central Railroad Company the sum of Two Thousand Five Hundred Dollars ($2,500.00)—conditioned that the said Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, defendants and appellants as aforesaid, shall prosecute their said appeal with effect; and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against them, they shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against them.

Witness our hands, on this, the 23rd day of May, A. D. 1913.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS AND MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Principals*,

By FISET & McCLENDON,
Their Attorneys of Record.

[L. S.] AMERICAN SURETY COMPANY OF NEW YORK,

By PAUL BERGHANS, *Res. Vice-President.*

Attest:
W. T. DECHARD,
Res. Ass't Secretary.

I have fixed the probable amount of costs in this suit in the court of Civil Appeals and the Court below at $50.00 and approve and file the foregoing bond this 26 day of May, 1913.

S. E. HARGON,
Clerk District Court, Llano Co., Texas.

Indorsed on back as follows: No. 1858. J. H. & J. R. Ward vs. H. & T. C. R. R. Co. et al. Appeal Bond. Filed May 26, 1913. S. E. Hargon, Clerk Dist. Court, Llano Co., Texas.

32 *Bill of Costs.*

Dist. Court of Llano County.

No. 1858.

J. H. & J. R. WARD, Plaintiffs,
vs.
H. & T. C. R. R. Co., Defendant.

Mr. —— ——, to Officers of Court, Dr.

To costs accrued in the above entitled cause to adjournment of the —— Term, 191-, of said Court.

Clerk's Fees.	Dollars.	Cents.
Docketing cause		.20
" Motions		.20
Issuing 2 writs Citation		1.50
" 2 Copies writs Citation		1.00
" 2 certified copies petition		8.00
" certified cop. Petition		
" 1 Subpœna for witness 5 names		1.00
" Subpœna Duces Tecum — names		
" Precept. Interrogatories		
" Precept. Interrogatories		
" Certified Cop. Interrogatories		
" Certified cop. Interrogatories		
" Commission to take deposition		
" Commission to take deposition		
" Execution. Recording Returns		
" Order of sale. Recording Returns		
" Writ of Attachment " "		
" " " Possession " "		
" " " Injunction " "		
" " " Sequestration " "		
" " " Garnishment " "		
" " " Citat. in error " "		
" " " Scire Facias " "		
" " "		
" " "		

33

	Dollars.	Cents.
Filing 17 Papers		2.55
Entering Appearance		
" 1 Continuance		.20
" 1 Order		.50
" Additional Length of Order		
" Judgment		
" Additional Length of Judgment		
" Final Judgment		1.50
"		
Recording Return on Citation		
" Return on notice		
"		
"		
Approving Bond		1.50
Swearing 4 Witness		.40
Swearing and Impaneling Jury		
Receiving and Recording Verdict		
Administering oath without seal		
Administering Oath With Seal		
Certificates with seal		
Certificates Witness Claims		
Assessing Damages		
Transcript 10,260 words		15.50
Taxing costs and copy		.25
Total Clerk's Fee		34.30

Sheriff's Fees.

	Dollars.	Cents.
Executing 1 Citation and miles Grayson	1.00	Paid
" 1 " and miles Travis	1.00	"
" Attachment and miles		
" Sequestration and miles		
" Garnishment and miles		
" Possession and miles		
" Injunction and miles		

34

" Scire Facias and miles	2.00	
" Restitution and miles		
Serving Notice and miles		
Summoning 6 Witness and miles	3.00	
" " and miles		
Jury Fee	.50	
Levying		
Posting		

Appraising	
Advertising	
Taking Care of Property	
Taking Bond	
Making Deed	
Commissions	
Returning writ of	
Total Sheriff's Fees	3.50

Witness Fees.

M. Dees	1.00
C. E. Shults	1.00
Arthur Calling	1.00
M. M. Moss	1.00
C. M. Wallace	1.00
Total Witness Fees	5.00

Notary's Fees.

Pd. by H. & T. C. R. R. Co.	6.00	
Dep. of wit. M. K. & T. of Texas	23.10	Pd. by
" " "	4.25	Deft.

One return of M. K. & T. not included as no fee shown.

Recapitulation.

Clerk's Fees	34.30
Sheriff's Fees	3.50
County Judge's Fees	
Jury Fees	
Printer's Fees	27.35
Notary Fees	6.00
35	
Stenographer's Fees	3.00
" " prep. statement facts	
Attorneys' Fees	35.00
Witness Fees	5.00
Grand Total	114.15
By Cash Paid	
By Cash Paid	
By Cash Paid	
Balance due	

THE STATE OF TEXAS,
County of Llano:

I, S. E. Hargon, Clerk of the Dist. Court in and for said county and State, hereby certify the foregoing to be a correct account of the costs adjudged against the Deft. in the above entitled and numbered suit up to this date.

Witness my hand and the seal of said Court, this the 4th day of June, 1913.

S. E. HARGEN,
Clerk Dist. Court, Llano County,
By —— ——, *Deputy.*

36 STATE OF TEXAS,
County of Llano:

I, S. E. Hargen, Clerk of District Court, Llano County, Texas hereby certify that the above and foregoing transcript contains a true copy of all proceedings in cause No. 1858, J. H. & J. R. Ward vs. Houston & Texas Central Railroad Company et al., in District Court of said county.

Witness my hand and seal of office, at Llano, Texas, this 5th day of June A. D. 1913.

[SEAL.]

S. E. HARGEN,
Clerk of District Court, Llano County, Texas.

Indorsed on back: No. 5282. Missouri, Kansas & Texas Railway Company et al., Appellant vs. J. H. & J. R. Ward Appellee-. From the Dist. Court of Llano County. Applied for by Fiset & McClendon Attorneys for Appellant on the 31st day of May, 1913, and delivered to Fiset & McClendon on the 5th day of June 1913. S. E. Hargen Clerk, District Court, Llano County. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, July 19, 1913 R. H. Connerly, Clerk.

In the District Court of Llano County, Texas, Spring Term, A. D. 1913.

No. 1858.

J. H. & J. R. WARD
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY et al.

Before Honorable Clarence Martin, Judge Presiding.

Hon. F. J. Johnson, Attorney for Plaintiff.
Messrs. Fiset & McClendon, Attorneys for Defendant, M. K. T. R. R. Companies.
Hon. W. B. Garrett, Attorney for H. & T. C. R. R. Co.

37 Be it remembered that in the trial of the above numbered and entitled cause before Honorable Clarence Martin, Judge of the Thirty third Judicial District of Texas, in the Distri

Court of Llano County, sitting without a jury, on to-wit, the 8th day of May A. D. 1913, the following evidence was adduced:

It was agreed by and between the attorneys for the plaintiffs and defendants that what is known as the Twenty-eight hour law was waived by the plaintiffs, that is, the cattle were released to thirty-six hours; that no notice, demand or claim was filed with or presented to any of the defendants in this case or their agents except the filing of the suit on the date stated by the file mark, on the 12th of November, 1912, and the shipment occurred on the 23rd day of August, 1912. It was further agreed that the facts stated in the answers of the M. K. & T. Companies are true, that is, that the rates were filed with the Interstate Commerce Commission; that the cattle in question were shipped under a limited liability rate amounting to $63.25 per car; that there was another rate which the shipper had the option of shipping under which was higher than the rate under which they were shipped but which carried full liability on the part of the carrier. It was further agreed that the defendants M. K. & T. Railway Companies might supply any testimony that had not been returned into court by statement of counsel as to what the record showed and it was admitted that those witnesses whose depositions had not been returned would testify in accordance with the statement made by counsel.

J. R. WARD, called as a witness on his own behalf, having been first duly sworn, on direct examination by Judge Johnson testified as follows:

I am one of the plaintiffs in this case and my brother, J. H. Ward is the other plaintiff. I live three miles from town down the river. There were 296 head of cattle in this shipment I made on the 23rd of August, 1912. I signed the contract of shipment over here with Mr. Tarrance, the agent of the Houston & Texas Central Railroad Company. The shipment was from Llano, Texas to Winona, Oklahoma and was made up of 245 steer yearlings and 51 cows.
38 The cattle were loaded about 11:30 in the morning but I left Llano before they did so I don't know exactly when they left. The cattle were in good condition. I never saw the cattle after they left Llano again. The cattle were shipped for grazing purposes to be fattened for the market. There was a market around Winona, Oklahoma, for cattle. The cattle were not fat but they were in good condition—stout and in good shipping condition—healthy cattle. I am acquainted with the cattle market at Winona. On that market the cows were worth $30.00 per head and the steers $26.00. Steer yearlings of this class were worth $26.00. The cattle would have been worth these amounts if they had been shipped up there in good condition. I did not accompany the cattle. Arthur Collins and Lige Burrows accompanied the cattle.

On cross examination by Mr. McClendon, J. R. WARD testified as follows:

I have never seen the cattle since they left Llano. There were 51 head of cows and 245 head of steer yearlings, in this shipment. Some of this stock I had bought just prior to this shipment; part of

it belonged to Mr. Bill Edwards out here about eight or ten mile
The rest of the stock was on my place about three miles from tow
I don't think that August 23rd is a very late time in the year t
ship cattle to the Territory. The usual time for such shipments
along in April—there are a great many more go in April than i
August. Of course August is too late for cattle to get fat for th
market that year—no one would expect that, at least, I would not.
would expect them to do well and grow. We still have the catt
in question; none of them have been sold. The stock were not poo
when we shipped them; they were in good shape. That year wa
a very dry one—it was pretty dry.

ARTHUR COLLINS, called as a witness on behalf of the plaintiff
having been first duly sworn, on direct examination by Judge John
son testified as follows:

My Name is Arthur Collins and I live nine miles south
39 here. I am twenty right years old. I remember accom
panying a shipment of cattle shipped from Llano for M
Ward on the 23rd day of August of last year. I was acquainte
with the cattle; I also saw them before they were shipped. The
were in good condition—they were in good shape and good cattl
They were a very good class of cattle—well bred and well grade
cattle. The shipment consisted of 245 head of steers and 51 cow
The cattle were loaded about 11:30 on August 23rd. I don't kno
just exactly when we left Llano, not right definitely. We wer
bound to have left Llano shortly after the cattle were loaded—sa
about one or half past one o'clock. Lige Burrows was with me an
accompanied the cattle. The cattle were shipped to Winona an
were billed to that point—they arrived there over the Katy. Th
shipment went by way of Elgin, from Elgin to Ft. Worth, and fro
Ft. Worth to Muskogee and Tulsa to Winona. It is six hundre
and sixty some odd miles from Llano to Winona—I am not righ
certain what distance it is. After leaving Llano on the 23rd
August we reached Winona on the 26th. I don't know how man
hours we were en route but is seems to me we were about eighty
one or two hours—between eighty-one and eighty-two. We reache
Winona at 9:30 P. M., on the night of August 26th. This woul
make some eighty odd hours we were on the road. We had seve
cars of cattle and I suppose we were on a through freight train
Oklahoma. I put most of the stops we had down. We ran prett
good until we got to Ft. Worth; the run was all right to Ft. Worth
I got to Ft. Worth at 3 P. M. on the 24th and left there at 8:30 th
night. We got to Muskogee at 11:30 A. M. on the 25th. I u
loaded there on the same day and remained there until 9:30 th
following morning. I made a note of all this and have it with me—
I put the time all down. I had a watch and I took the stops w
had down. My notes read "Arrived at Ft. Worth at 3 P. M., Augu
24th, left 8:30 P. M.; arrived at Muskogee 11:10 A. M. Augu
25th; unloaded at 2 P. M. and stood on track in cars before u
loading, four hours. Remained in Muskogee until 9:30 A. M.
the 26th; arrived in Tulsa 3 P. M. on the 26th, left there at 4:

P. M.; arrived at Osage City 6:30 P. M. stood on track until
40 8:30 P. M. and arrived at Winona 9:30 P. M. August 26th."

These notes show the time I was on the road. As to whether there was any rough handling of the cattle, well, I have been going with cattle for several years, all the way from one to two trips a year, and this is the first trip that they put my cattle next to the caboose—they put them next to the caboose between Muskogee and Osage City—I don't know exactly where it was. They didn't have any bull boards on in three cars and the doors were loose at the bottom. We stopped on a siding out in the country and got a piece of baling wire and tried to wire the doors at the bottom but couldn't do it. We tried to stop them up with straw but the cattle would get their legs through. I helped as many as nine cattle up out of one pile. One would drop its legs through and when the cow couldn't get up in the car I would have to get in and help them. The legs of the cattle would drop through the doors of the car outside and there wasn't anything to protect it. There wasn't any bull board and it wasn't latched at the bottom. I tried to get them to fix it but they didn't do it. The bull board is a cross bar that keeps the cattle from pushing against the door—it is to protect the door so cattle can't push against it—the cars didn't have any. The effect of it was that the cattle were skinned all over, had their horns knocked off and they were tramped and the cattle would break their ribs and we had to get in there and tail them up—we had as many as nine down on one car between Muskogee and Osage City. The cattle received their rough treatment from Ft. Worth on, from jerking of the cars. The cattle were put at the back end next to the caboose and the front end was so much heavier and the back end so much lighter it jerked them lots worse. I never went on a train but what the cattle was next to the engine and I don't know why they put my cattle next to the caboose. They had all kinds of cars on the train. It seemed to me that there was right smart unusual switching. It was rough and in connecting up cars it didn't seem as though they cared how hard they hit. They knocked the cattle
down and it didn't seem like they cared. I watched the
41 cattle and was with them all the time; I never was away
from them. We unloaded the cattle at 9:30 at night at Winona and they were in very bad condition. Their horns were knocked off and they were skinned all over and they were crippled—a good many of them. Their general condition was bad. A good many were crippled and the biggest majority of them were skinned. There was one dead cow when we got there. Six of the other cattle died from the effects of the trip. These six were steers and they died right around there at Winona where we unloaded them. I kept the cattle there at Winona between six or eight days—I am not positive of the exact time. We tried to drive them away but we couldn't do it—they weren't able to go. We had to turn around and leave them there as we couldn't take them off—they couldn't go. The six that died did so that night or the next morning. I did not do anything with the dead ones—there were two boys asked me if they could have the hides and I told them yes. They skinned three of them; I don't know whether they skinned the others or not.

Seven cattle in all died—one dead when I got there and six died after I got there at the pens. I think I am acquainted with the reasonable market value of cattle at Winona. I have been going up there seven years. I know of sales being made and that there was a market for cattle. I don't think a person could have gotten over twenty dollars for the steers when we got there and twenty dollars is all they were worth when we got there. If it had not been for the delays and injuries the steers would have been worth $26.00. The reasonable market value of the cows was $25.00 in the condition that they got there. If it had not been for the delays and injuries that I have testified about they would have been worth $30.00. I believe the distance to Winona is about 660 miles. I know the usual and ordinary time for a shipment to go through—it is fifteen or twenty miles per hour, for this class of train. I have been to Winona twice and I have also gone to Fairfax, Oklahoma. I would think it is about the same distance from Fairfax to Llano as Winona and Llano—I don't think there is much difference. Fairfax may not be quite so far and it might be a little further.

I never went over thirty six hours in going to Fairfax,
42 thirty six hours is the usual time in going to Llano from Fairfax and to Winona is about the same—it ought to be the same—thirty-six hours.

On cross examination by Mr. McClendon, ARTHUR COLLINS testified in substance as follows:

I am not a typewriter. The original of this memorandum is at home and this is just a copy. As to whether Judge Johnson wrote this out, I sent it up to town in my book and they copied it off from that. In regard to whether I had a good run from here to Ft. Worth I had no complaint, I didn't set anything down from here to Ft. Worth. We staid in Elgin maybe an hour or three-quarters—I did not set that down but you might say I had a good run from here to Ft Worth, I unloaded at Ft. Worth and not at a place called Hodge. I never unloaded at Hodge. Hodge is the other side of Ft Worth. I know I am not mistaken when I say the cattle were unloaded at Ft. Worth, I know when I get to Ft. Worth. We got there at three o'clock in the afternoon of the 24th of August. I unloaded there and staid there five hours and thirty minutes. It is not a fact that we got to Ft. Worth at 1:25 P. M. and we did not get to Hodge at 3:00 P. M. and unload at 3:15. It is not a fact that we reloaded the next evening at 8:45. I know when I got to Ft. Worth; I put that down—we got there at 3 P. M. and loaded back at 8:30 P. M. I went from there to Muskogee and got there at 11:10. I would not know Hodge if I were to see it but I do Ft. Worth when I see it. I am positive it was Ft. Worth where we unloaded—I think I have been there enough to know Ft. Worth when I get there. I know all about the town. From Ft. Worth on we had a bad run—we left there at 8:45 on the 24th, and as to what trouble we had from Ft. Worth on to Denison, I never did mark down every place—I just marked down from Ft. Worth to Muskogee where we fed. The run from Ft. Worth on was slow and they jerked us. It didn't seem as though they cared how they

handled the shipment. In regard to whether there was any rough handling between Ft. Worth and Denison, that was back this way—I don't think I had any bad handling from Ft. Worth back this way but we were handled pretty rough from Ft. Worth on
43 clean through. I don't know what time we made from Ft. Worth to Denison nor do I know what time we made from Ft. Worth to Muskogee, only we left there and got to Musokgee at 11:10, that is, we left Ft. Worth at 8:30 P. M. and arrived at Muskogee at 11:10 the next morning. I don't know what the distance is between those two points. We stayed in Muskogee from 11:10 that morning until 9:30 the next morning. I think we were on the cars three hours before we unloaded—I think that is right—three or four. During that time with the exception of three hours the stock was in the pens. We didn't have any bull boards on the cars but the cattle didn't seem as though they got down so bad until we got to Muskogee, from there on they got tired. We did not make good time from Muskogee to Winona. I think it was between Osage and Winona that we stopped and got a pieve of wire and tried to fix the boards. That was what we stopped for was to fix the doors. And then we stopped one time for a train. I don't know what kind of a train it was, I guess it had workmen on it—it seemed like they were people that worked on the railroad. We stopped there maybe thirty minutes, maybe longer to let that train get out of the way. This was between Osage City and Muskogee. Between Muskogee and Osage they put my cattle on the hind end of the train. There was telephone poles in the rest of the train and there weren't any other cattle on the train. My seven cars were the only cattle in the train—I am sure of this. Of course they had to put some cars next to the caboose but they didn't have to put my cattle there. They could have put those poles on the end it wouldn't have hurt the poles to jerk them. I stayed up there with the cattle for eighteen days I think. The man who went with me was there twenty days and I was there eighteen. I was out in the pasture with them all the time. I have not seen the cattle since that time. The cattle that died were all streets except one cow. The cattle sure looked pretty bad when we got there. Even on that good grass up there they didn't shape up very fast. The grass was pretty good where I had those cat-
44 tle. As to whether when cattle just come off of a trip it is a pretty bad time to sell them, well, I don't know—I have gone up there with a good many that looked pretty good when we got there. If there is anything the matter with the cattle it is better to hold them a while because of the injuries they get over in time. As to whether any of them had their ribs bruised, I didn't walk around and stick my fingers in their sides but the way they were tramped, if their ribs were breakable they were broken because they were down very bad. Some of the cattle had their horns knocked down—I didn't count how many but approximately there was fifteen or twenty or twenty-five, maybe not that many and maybe more than that, I could not say. There were a good many cattle crippled but I did not count the number. When I say crippled I do not mean legs broken but just crippled up and very lame.

On redirect examination by Judge Johnson, AUTHER JOHNSON testified as follows:

The cattle were fed at Ft. Worth. I do not know the distance from Ft. Worth to Muskogee but we fed at Ft. Worth, arriving there at 8:30 P. M. on the 24th and got to Muskogee the next day at 11:10 where they took me out and fed the cattle again. We left Muskogee the next day at 9:30, on the 26th. The cattle were fed on hay—we used 28 bales. Twenty-eight bales is four bales to the pen, seven pens. Anyway we gave them four bales of hay to the pen. The cattle limped because they had fallen through the car bull boards and the rest of cattle would tramp them—that is what crippled them. The cattle would not have been crippled if the bull boards had not been broke. I had to hold the cattle at Winona six or eight days because I wasn't able to move them. We started them but we couldn't go. Elmo Tate, George Fry and fellow by the name of Gray—I don't know what his given name was, were also with the cattle there. I looked after the cattle myself and these men were there to help move them. When the cattle got down I would cut the little old tin tap on the doors and get in there while the train was going and help them up. I don't think this is the usual way of doing; I have heard several say they told the train men to wait until they jabbed the cattle up. There is a little old tin tap and a kind of cord piece on the doors and I always cut that and climbed in—it saves time stopping. The fact of the business is I never did ask them to stop; I always got in there and helped them up when they got down. We had a pretty good run (questioned by Judge Garrett) between Llano and Elgin and I had no complaint to make.

J. R. WARD, recalled on his own behalf, on direct examination by Judge Johnson, testified as follows:

I have been in the cattle business for several years and have had experience in the buying and shipping of cattle to the territory. I never did accompany a shipment to Winona but I have a good many to Fairfax—they are about the same distance from here. As to what is the usual and ordinary time for a cattle train to go from Llano to Fairfax or Winona if they are about the same distance, I think they certainly could make it—I have made it in a great deal less time—but they certainly could make it around forty hours. They have made it in less time than that considerably. I have had two train loads out of here that made it in a great deal less time than that. I had one train that unloaded in Fairfax in twenty-nine hours and another that same spring in 31 hours. I would think fifteen or twenty miles an hour would be a reasonable rate of speed for a cattle train like this. Fifteen or twenty miles an hour is usual and ordinary time, where you get good runs. As to what in my opinion would be the effect on a shipment of cattle to be delayed twenty-five or thirty or forty hours, you would have to be governed by the condition of the cattle—sometimes it would be worse than others. On cattle like mine the effect would be more damaging on the value of the cattle than if they were carried to their destination in the usual and ordinary time. The delay would be injurious to the cattle—they ar

hurting until they are unloaded. Cattle are not as able to stand the latter part of a trip where they are delayed as they are the early part of it; the longer they are loaded the worse they are hurt and the more they are damaged. The cattle decrease in weight and
46 the longer they are loaded the more tired they become—they get down worse and things like that. When they get down they are tramped and fall over one another and whenever cattle are piled up in cars they get hurt and the longer they are in transit the worse that is—the less able they are to take care of themselves and to stand the trip. How much the cattle are hurt depends on the way they are handled.

C. M. WALLACE, called as a witness on behalf of the plaintiff, having been first duly sworn, on direct examination by Judge Johnson, testified as follows:

My name is C. M. Wallace and I live in Llano, Texas. Am in the stock business and have been so engaged for five or six or seven years. I have had experience in the shipment, sale and transportation of live stock from here to Fairfax and Winona, Oklahoma. I don't know the difference in the distance between here and Winona and Fairfax. I know where Fairfax is and have had occasion to ship cattle there. The usual and ordinary time in making a shipment from Llano to Fairfax is in the neighborhood of forty or forty-five hours. They don't always run you alike but usually it is about forty hours. I have been told that they have made the trip in less than forty hours; I don't think they have ever run me in much less time. I never made but one trip to Fairfax but I have been to Winona. The usual and ordinary time of making a shipment of cattle to Winona is about the same as it is to Fairfax—forty or forty-five hours. Cattle being thrown down in a car on top of each other and jerked down—this has a tendency to injure them—it bruises them up. I have seen them jerked down in a car and I think I know the effect of it. I think cattle suffer worse the longer they stay on a train, more than the do at the beginning. The longer they stand up in a car the more tired they get and finally they lay down. When they lay down the others will fall over them and may be all of them will get down—the jerking of the train, you know,—that is my experience. Cattle could not stand a delay in the
47 latter part of the trip as well as they could in the first part. They grow weaker and less able to stand this trip.

On cross examination by Mr. McClendon, C. M. WALLACE testified as follows:

In shipping cattle out of Llano to the territory it is most generally the custom to ship in the spring—I have known some shipments here in the fall but that is not a usual thing. As to whether cattle don't stand shipment from here to the territory better in the spring than in the summer, I never have been up in the summer or fall either one but in the shape they are in I imagine they can stand it better in the fall. I believe they would stand it better in the fall because

they are stouter. August is pretty hot weather but at that time they ought to be in better condition. About whether keeping them confined in cars is worse in August than it is in cooler weather, I never had any experience that way—I only ship in the spring of the year.

JIM WYCOFF, called as a witness on behalf of the plaintiffs, having been first duly sworn, on direct examination by Judge Johnson, testified in substance as follows.

My business is handling cattle and I have been so engaged twenty-five years. I have had experience in shipping cattle and have been with cattle that went to Winona. In regard to what is the usual and ordinary time in making a shipment to that point, I have made it in different runs. The usual and ordinary time ought to be between thirty-five and thirty-eight hours, say forty—that is the usual time that I get a good run. When I get a good run I make it in about thirty-six hours—I have made it in that time. I saw the shipment of cattle in question the morning they were loaded. I was there and helped to cut them in there—the cattle were in good shipping
48 shape—they were stout cattle. A delay of thirty or forty hours would sure affect the market value of cattle. After such a delay the cattle are drawed and worried to death after they have stood on their feet so long. Cattle cannot stand a delay in the last part of a trip as well as they can in the first part—nothing like as well because they are wore out—they have stood there until they are wore out, starved and thirsty, confined in the car. The effect is to weaken them and they are less able to stand delay; they are just wore out. The usual and ordinary run that I speak of (asked by Mr. McClendon) is by way of Elgin on the Katy. As to whether we usually unload en route, sometimes, yes sir. Sometimes we go through without unloading and feeding—they have done it.

M. M. Moss, called as a witness on behalf of the plaintiffs, having been first duly sworn, on direct examination by Judge Johnson, testified substantially as follows.

My name is M. M. Moss and I live in Llano. Have lived here practically all my life. I am in the cattle business and have been so engaged for the last ten or twelve years. I have had experience in the purchase and shipment of cattle and have had occasion to ship cattle to both Winona and Fairfax. In a through shipment of cattle from Llano I think a shipment makes as a rule fifteen to twenty miles per hour as usual and ordinary time—twelve to twenty miles is the time they make as an average. As to what is the usual and ordinary time for a cattle train going from Llano by way of Elgin, Ft. Worth, Muskogee, McAlester and Osage up to Winona, when we run through without feeding I would say we make from thirty-four to forty hours—we used to go through without feeding. I don't remember of late years there has been any shipments went through without feeding. When they stop and feed en route it would be anywhere from forty-six to fifty hours as the usual and ordinary time, maybe a little longer. Nearly always they stop and feed once in transit of late

years. It would be unusual to stop and feed twice. I don't
49 think they do that unless there is some unusual delay. It takes thirty-six to forty hours to make the run without feeding but when they stop to feed it takes five to eight hours longer. Thirty-six to forty hours is the actual running time, without counting time to stop and feed. A delay of thirty or forty hours on a train of cattle shipped in August, the cattle in fair condition, would tend to impair the market value of the stock. The exact amount of damage would depend a good deal on the cattle and on what caused the delay. The delay is injurious always to cattle being shipped. Any delay that keeps cattle standing in the cars is injurious to them. The longer they stand there the more injurious *is* is to them. A delay would naturally tend to injure them, and a delay of thirty or forty hours would hurt them worse than if they went through in the usual and ordinary time. The longer cattle are on the cars the harder they are to keep up and when they lay down or get knocked down the other cattle get jerked over them and that causes them to be bruised up. The longer they are on the cars the more apt they are to lay down. This tendency depends on the way the cattle are handled. They are not as apt to lay down when the train is moving as when it is standing still. When the train is standing the cattle are harder to keep up. I don't know the distance in miles from here to Winona. In recent years it has been the custom always to unload (asked by Mr. McClendon) once en route from Llano—I don't know of any through shipments going through without feeding in the last three or four years. By waiving the benefits of the twenty-eight hour law cattle can go through *to* thirty-six hours without feeding. It would be better for cattle not to feed at all if you could get them through in thirty-six hours—it is our judgment that it would be better to waive the twenty-eight hour law if you can reach your destination at least we always do. We want to get there as quick as possible and cattle don't get much rest in the loading pens, loading and reloading—we think it is better to go on than it is to stop. It saves buying feed too (asked by Mr. McClendon) but the feed bill don't amount to so awful much.

50 M. A. DEES, called as a witness on behalf of the plaintiffs, having been first duly sworn, on direct examination by Judge Johnson, testified in substance as follows:

I live in Llano and have lived here about seventeen years. Am in the stock business and have been so engaged about ten or twelve years. My experience includes the purchase and shipment of cattle to various points in and out of the state. I know where Winona is. The usual and ordinary time in making a shipment of cattle from Llano to Winona, Oklahoma, is about thirty-six hours, maybe forty-two or four hours—we have different times in making it. The time stated includes feeding—no, that would not include a stop to feed—I don't know just how long they stop to feed as a rule, I believe though about six hours. I have seen them run through in thirty-six hours but that is when they didn't feed. They usually feed shipments one time in going from Llano to Winona. Sometimes they go

through without feeding but usually I think, they feed. As to what would be the effect of a thirty or forty hours' delay on a shipment of 245 steers and 51 cows in fair condition en route to Winona, Oklahoma, it would certainly damage them for the reason that the longer they stay on the train they naturally become tired and they will lay down and get down so that you can't keep them up just like anything else wearing out. I never saw the shipment of cattle in question.

JOHN H. WARD, recalled on his own behalf, having been sworn, on direct examination by Judge Johnson, testified as follows:

I paid the freight on the cattle but I never paid the feed bill. I do not know what the feed bill was on this particular shipment. We paid the bill; it was collected at Winona, all charges against the shipment. Henry paid the feed bill up there and I have no copy of the feed expense. I know what they charge for hay in the stations but I don't know what the feed bill was in this case.

Plaintiffs Rest.

51 DEFENDANT'S TESTIMONY.

The defendants, Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company offered and read in evidence the original shipping contract, under which the shipment in question was made, and copy of which is hereto attached as follows:

Attached as Exhibit "A" as First Amended Original Answer of Def't M. K. & T. Ry. Co. of Texas.

Shippers will please read this Contract carefully, as changes have been made from Form heretofore used.

The Missouri, Kansas & Texas Railway Co. of Texas.

Rules and Regulations for the Transportation of Live Stock.

Notice.

This company has two rates and forms on contracts on live stock.

Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be less than published tariff rate applying thereon when transported at carrier's risk.

All kinds of live stock, carrier's risk, will be taken under the provisions and at rates provided for by existing tariffs and classification.

Special Live Stock Contract No. 66.

Executed at Elgin, Tex., Station, August 23rd, 1912.

This agreement, entered into by and between The Missouri, Kansas & Texas Railway Company of Texas, and each carrier adopting it, hereinafter called the carrier of the first part, and J. H. Ward hereinafter called the shipper of the second part, this 23rd day of August, 1912. Witnesseth:

The carrier agrees to let to the shipper 7 stock cars numbered — which the shipper has selected and desires to use for the shipment of 122 head of S Cattle and to haul said cars consigned to J. H. Ward at Wynona, when loaded and delivered to carrier together 52 with the shipper, party or parties in charge thereof from

Elgin to
(Do not insert any station beyond our line)

Wynona all as heretofore pro-
(Do not insert any station beyond our line)

vided as the rate of — Dollars per car, or — cents per hundred pounds from —— to destination, subject to minimum weights and length of cars provided for in tariff, the same being a special rate, which the carrier guarantees, and less than the regular tariff rate applying on shipments of live stock not covered by this special contract.

It is mutually agreed that if the destination of the aforesaid cars be on the line of the Missouri, Kansas & Texas Railway Company of Texas, then the Missouri, Kansas & Texas Railway Company of Texas, agrees to deliver same to consignee after the payment of charges and surrender of this contract, but if the destination of such cars be beyond the line of the Missouri, Kansas & Texas Railway Company of Texas, then the Missouri, Kansas & Texas Railway Company of Texas agrees, and it, and each connecting carrier in turn, is hereby authorized to deliver said cars to its connecting carrier for transportation under the terms, stipulations, limitations and agreements herein contained, and each and every carrier receiving said cars for transportation shall be deemed to adopt the terms and conditions hereof and assume the like liabilities and shall be entitled to all the provisions, exemptions from and limitations of liability and other stipulations governing the measure and adjustments of damages herein contained; it being understood and agreed that the duty and liability of The Missouri, Kansas & Texas Railway Company of Texas, and that of every other carrier transporting said cars hereunder, absolutely ceases and terminates upon the delivery by it of said cars to its connecting carrier.

In consideration of said special agreement by the carrier, it is further mutually agreed and stipulated as follows:

53 1. The shipper agrees to select no cars for transportation of his live stock which is not in a suitable condition therefor, but the carrier shall, upon demand made by the shipper, either

before delivery to it for transportation, or while in transit, make any needed repairs at its cost.

2. The shipper shall load, unload and reload said cars and see that the same are securely fastened, and shall feed and water said live stock and attend to them while in carrier's stock yards, pens or said cars at his own cost and expense, but the carrier, agrees to allow said shipper free use of its pens and chutes. The shipper shall leave said pens and chutes in like condition which he finds them.

3. The carrier shall stop said cars at any of its stations where it has facilities for watering and feeding, whenever requested to do so in writing by the shipper, and shipper agrees that he will not confine said live stock for a longer period than thirty-six consecutive hours without unloading the same for rest, water and feeding for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes, and the character of the cars used will not permit of their being properly fed and watered therein, and the carrier agrees to have it- pens arranged as to allow him to do so.

4. The shipper, shall, upon the arrival of the cars at destination and delivery to him, unload said live stock and surrender said cars in the like condition which he found them, except as against acts of the carrier.

5. The carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shippers for any purpose, and the shipper shall bear all damages resulting from his negligent doing, or failure to do, any of the things which he hereby contracts to do, or from the negligence of any of his servants.

6. The shipper is in no sense an agent, employee or servant of the carrier, but is his own master in and about the matters
54 and things by him to be performed under this contract, and he shall furnish all his own employees for doing everything which he hereby contracts to do, and which he cannot do personally, and the carrier shall be liable for no*t* act nor omission of the shipper, nor of his servants, nor for the acts of any of carrier's servants at the request or for the advantage of shipper, but said servants of the carrier shall for the time be considered employees of the shipper. The carrier, however, agrees to make no charge for the time of such servants. In no case shall the carrier be required to carry more employees of shipper, including shipper, than endorsed on the back hereof, and none except those whose names are written hereon.

7. The shipper or party or parties in charge of said cars will only be carried on the train d*a*rwing said cars, in accordance with the rules on the back hereof, and the failure to observe such regulations shall be an absolute bar to any right to recover damages for any injuries or deaths resulting from such failure to observe the same. And he and they and each and every of them, who shall receive any injuries by reason of the negligence of the carrier, or otherwise, shall have no right of action therefor, unless notice in writing of the claim

'or damages on account of such injury be given the nearest, or any ither convenient local agent of the carrier or the General Superinendent of said Railway Company at Dallas, Texas, within ninetyne days of the date of the injury. Such notice must state the time, place and particulars of the injury and the nature and the extent of he damages, and no other or further damages can be recovered than hose set forth in this notice.

8. The carrier does not ship live stock or Emigrant Outfit under his contract or at the rate herein given which exceed in value the following prices per head.

Each horse (gelding, mare, stallion) mule or jack	$100.00
Each pony or range horse	30.00
Each ox, steer or bull	50.00
Each cow	25.00
Each Calf	10.00
Each hog	7.00
Each sheep or goat	3.00

Emigrant Outfit (not Live Stock) consi-ting of Emigrant Movables, Household goods, Second-hand Farm Machinery, etc. when loaded with live stock as per classification at valuation of not to exceed $5.00 per one hundred pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation or handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, that shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above.

9. The shipper shall furnish reports, signed by himself and all parties in charge of said live stock, to the conductor of the train at the end of each division of carrier's line, as to the condition of live stock, and the shipper shall be estopped from denying the truth of such reports; and his or their failure to furnish such reports shall be conclusive evidence that said live stock were in good condition. The shipper further expressly agrees that as a condition precedent to his right to recover any damages for loss or injury to said live stock while in the possession of the carrier, he will give notice in writing of the injury, to the conductor in charge of the train or the nearest station agent or freight agent of the carrier on whose line the injury occurred, before said cars leave that carrier's line or before the live stock are mingled with other live stock or removed from pens at destination. In his written notice, he shall state the place and nature of the injuries to the end that they may be fully and fairly investigated. The shipper further expressly agrees that as a condition precedent to his right to recover for any loss or damage resulting from shrinkage in weight, decline in market, yardage and feed bills and all other damages caused by the negligent delay or delays of the carrier, he will give notice in writing duly verified by affidavit, to the nearest station or freight agent of the carrier

on whose line the injuries or delays resulting in such damages oc
curred, within five (5) hours after said stock are sold or loaded fo
reshipment as the case may be. If the owner does not accompan
said stock, the person who accompanies the same for him shall be hi
agent to give said written notice, verified by affidavit, and if neithe
said owner nor anyone for him accompanies said stock; then th
consignee is hereby constituted his agent for the purpose of givin
said written notice. To the end that any claim may be fully an
fairly investigated, there shall be stated in the written and verifie
notice the place and nature of the injuries and extent thereof, th
shrinkage in weight, the decline in market, the extra amounts pai
for feed, yardage, or any other loss or damage, and the dispositio
of the stock, and if sold, the person to whom sold. The shipper sha
within thirty (30) days after the happening of the injuries or delay
complained of, file with some freight or station agent of the carrie
on whose line the injuries or delays occurred, his written and dul
verified claim therefor, giving the amount. Shippers failure to com
ply in time and manner with the requirements of this section sha
absolutely defeat and bar any cause of action for any injuries o
delays to said livestock as aforesaid, and no suit shall be brough
against any carrier, except against the carrier on whose line the in
jury or delay occurred, and no damages can be recovered excep
those set forth in the required written notice and claim aforesaid
and in no greater amount than claimed in said notice. No suit sha
be maintainable unless instituted within ninety-one (91) days afte
the happening of the injuries, delay or delays complained of, an
statute of limitation to the contrary notwithstanding.

10. As a further consideration for the reduced rate herein given
the shipper hereby releases and waives any and all causes of actio
for damages by reason of any written or verbal contract for th
57 shipment of said live stock or any of them prior to the execu
tion hereof, and will hold the carrier harmless from any an
all claims for injuries to persons accompanying said live stock a
aforesaid, resulting from carrier's or employees' negligence, or othe
wise, and will indemnify it from any damages it may be require
to pay by reason thereof, or any expense it may be put to or damage
it may be required to pay, by reason of the introduction of said liv
stock into a country or State against the quarantine or other laws o
the United States, or of any State, people or community.

No agent of this company has any authority to waive, modify o
amend any of the provisions of this contract, or to agree to ship sai
cars by any particular train, or to reach any particular market, o
furnish any particular kind of cars, or to furnish cars on any par
ticular day, which the carrier hereby expressly declines to do.

Executed in duplicate the day and date first aforesaid.

THE MISSOURI, KANSAS & TEXAS
RAILWAY CO. OF TEXAS.

(Signed) B. E. CRAWFORD, *Agent.*
" E. A. BARRER, *Shipper.*

Witnesses:
(Signed) A. M. DAVIDSON.

To be other than either party hereto.)

NOTICE.—This pass must be carefully filled out by the agent at destination, when presented by parties who accompanied the live stock and who are entitled to return pass according to tariffs, after plainly writing across the face of the Contract "Delivery Effected."

Drover's Pass.

Issued by The Missouri, Kansas & Texas Ry. Co. of Texas.

Good for Continuous Passage Only.

Pass E. A. Barrer, Wynona, Okla. Elgin, Tex., from destination of live stock to point of origin. This pass is not transferable
58 and must be presented to the train conductor for continuous passage within 24 hours after the date and hour of issue.

J. I. WEST,
General Freight Agent, Dallas, Texas.

Date of issue 8/23, 1912. Hour of — m.

Witness:
W. L. McDOWELL.

Countersigned:
R. D. COPELAND,
Agent The M., K. & T. Railway Company of Texas or Delivering Line.

This pass must be written in ink otherwise it will not be valid.

Notice.

As a means of identification the agent issuing this pass will require each person to write his name in the space below, and will cancel the lines not required, by drawing a pen through them.

If this pass is found in the hands of any person other than those whose names are written below, the conductor will take up and collect full fare.

Any person accepting or riding on this free pass thereby and hereby agrees to assume all risks to person or baggage except for wilful or active negligence of the carrier.

____ ____.
____ ____.

(The person above named must sign this pass before it will be accepted for passage.)

For Identification Signature.

B. K. Rupert 536 8/26 504 to A 245.

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.....

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Instructions to Agents.

The published Tariffs of this Company contain provision for the transportation of men in charge of live stock and the free
59 return of them, and this blank form must not be used except as authorized by the Tariffs. When free return transportation is not authorized by Tariffs the blank space under the head of "Drover's Pass" must be cancelled by agent who issues contract, drawing lines in ink through them.

NOTE.—Agents will make contracts in duplicate, giving one to shipper, keeping the other on file at their station until this book is all used—stubs should then be sent to the general Freight Agent, Dallas, Texas.

No. —.

The Missouri, Kansas & Texas Ry. Co. of Texas.

—— Station, —— —, 191–.

Live Stock Contract.

The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identify themselves whenever required to do so by any conductor. A failure on his or their part to observe the same shall be an absolute bar to any right to recover damages for any injuries resulting in death, or otherwise, therefrom.

1. Remain in the caboose attached to the train drawing said cars while the train is in motion.

2. Get on and off said caboose while same is still.

3. Get on or be on no freight or other cars while switching is being done at stations.

4. Will not walk or stand on any track at station or other places at night without a lantern.

5. In consideration of this free return transportation, I hereby agree that in case of any accident, wreck, mishap or other casualty, in which I may or shall receive any personal injury, I will notify the Railway Company in writing through my home Agent, or other nearest or most convenient Local Agent of the Railway Company, or the General Superintendent of said Railway Company at
60 Dallas, Texas, of such injury, and of the time, place, circumstances and extent thereof, and in default of my so doing within 91 days after the happening of such injury, I hereby agree to waive any and all causes and right of action for or on account thereof. And I further agree that I shall not have any cause or right of action nor maintain any action, for any injury, except that of which I shall in said notice as aforesaid, advise the said Railway Company.

6. The Railway Company will receive the usual amount of baggage and check and transport same on its regular Passenger trains, but the Railway Company expressly refuses to receive such baggage on trains hauling said stock, as it has no facilities for caring for same, and if the party or parties in charge of the stock elect to take any baggage along with them in the caboose or other cars on stock train, they retain exclusive custody and care thereof and assume all risk of loss of same or damage thereto from whatsoever cause arising, including the negligence of the Railway Company and that of its servants and Agents, and said parties are warned that the Railway Company will exercise no care whatever over said baggage on stock trains.

1 .....

2 .....

3 .....

Employees of Shipper.

.....

Pass on freight train drawing cars set out in contract on reverse side hereof .....

——— ———,

——— ———,

Employees of Shipper.

——— ———,

Agent.

Special Instructions to Conductors.

You will require all persons presenting this Contract to identify themselves by writing their names on the lines under heading "For Identification Signature," and compare such signature with the signature as written on lines 1, 2 and 3, under heading "Live
61 Stock Contract," in order to satisfy yourself that the pass is being used by the proper parties.

——— ———,

General Superintendent.

Car Number.	Initials.	WAY-BILL. Series.	No.	Tear off from top down to No. of Cars in shipment.
.....				20
.....				19
.....				18
.....				17
.....				16
.....				15
.....				14

.....13
.....12
.....11
.....10
..... 9
..... 8
..... 7
..... 6
..... 5
..... 4
..... 3
..... 2
..... 1

NOTE.—Agents will punch descriptions of party accompanying stock. If shipment consists of more than six cars and more than one attendant accompanies it, the description of each must be punched. If more than three in charge, separate contract should be issued for other parties. Agents not furnished with a punch, will cross out description with ink.

Number Cars on Contract.

On the right hand margin of this form, tear off from the top down to the number representing number of cars in the consignment. At the foot of this column tear off from the bottom up to the number representing the number of men accompanying shipment on this contract

.....

62 Description of party in charge accompanying.

Size.	Height.	Hair.	Beard.	White.
Slim, Medium, Stout.	Tall, Medium, Short.	Light, Gray, Dark, Red.	Mustache, Chin, Side, Full Beard, None.	Colored.
1 000	0 0 0	0 0 0 0	0 0 0 0 0	0 0
2 000	0 0 0	0 0 0 0	0 0 0 0 0	0 0
3 000	0 0 0	0 0 0 0	0 0 0 0 0	0 0

Number of men in Charge. ONE TWO THREE

Tear off to No. of men with shipment.

The defendants offered in evidence the deposition of H. R. TIDWELL, as follows:

My name is H. R. Tidwell and my age is wenty-six years. My residence is Smithville, Texas, and my present occupation is Conductor for the M. K. & T. Railway Company of Texas. I have resided six years at Smithville, Texas, and have been a conductor for two years. I handled the shipment of cattle in question and was in the employment of the M. K. & T. Railway Company of Texas at

that time as conductor. My duties were those usually performed by a conductor on a freight train and in connection with the said shipment of cattle were performed between the stations of Elgin and Hillsboro on the lines of the railroad mentioned. The cattle moved from Elgin to Hillsboro under my supervision, the distance between said points being 122 miles. The cattle were handled in a through freight train between said points. We left Elgin at 2:00 A. M., August 24th, 1912 and arrived at Hillsboro at 9:50 A. M. August 24th, 1912. This trip was made in the usual and ordinary time for the season of the year made by trains of this character between said two points. The shipment of cattle was handled in a first class manner and there was no switching, jolting, unnecessary jarring or rough handling. The train was delayed at the following points: at Coupland, 20 minutes, caused by setting out a bridge outfit; at Granger, 1 hour, caused by cleaning fire and taking coal and water; at Bartlett, 20 minutes, caused by setting out cars; at Temple 10 minutes, caused by taking water and setting out cars; at
63 Waco, 40 minutes, caused by setting out and picking up cars. The delays were about as usual for a train of this character between said points. There were no delays or sidetracking for the purpose of passing trains. The cattle did not pass through any division points while in my charge. The rating of the engine was 960 tons and the tonnage actually pulled was 800 tons. I made no examination of this shipment of cattle other than walking along by the side of the cars containing same. My records covering this shipment do not show that there were any cattle down or dead.

To the cross interrogatories H. R. Tidwell answered in substance as follows:

I have been employed by the M. K. & T. Railway Company of Texas for six years, as brakeman and conductor. Have been a conductor for two years. I do not know how many shipments of cattle I have handled since I have been so employed. I am not testifying from memory alone, but from records that I made myself on the date the shipment of cattle in question was made and said records have been in my possession ever since they were made. A true copy of my records covering this shipment of cattle while in my charge is attached hereto. There were only seven cars of live stock in my train between said points. There were twenty-two other cars besides those containing live stock. I did not do any local work on this trip. The usual and ordinary time for a through stock train between the points mentioned is from six to eight hours, and for a through freight train it is from eight to ten hours. It would have been unusual last August for a through stock train and especially a through freight train to have made twenty or twenty five miles per hour. It is true that a waiver by the shipper of the twenty-eight hour law accompanies the way bills pertaining to said shipments and the waiver covering on this shipment was attached to the way bills if there was such waiver. I made no examination of the
64 shipment of cattle other than walking along the side of the cars. I remember this shipment since referring to my rec-

ords and refreshing my memory. There were some men accompanying the cattle but I do not remember now how many or who they were. The cattle were not unloaded at any point while in my charge. I do not know about the classes or ages of said cattle. Cattle trains can be handled either smoothly or roughly. I never handled any cattle shipments roughly and I can't recall that I ever saw a shipment of cattle handled roughly by a railroad that I was working for. This is the first time I have ever been called upon to testify as to the handling of a shipment of cattle.

The Defendants next offered in evidence the deposition of the witness J. B. McNeil, who testified in substance as follows:

My name is J. B. McNeil. My age *us* 43 years and my residence is at Ft. Worth, Tarrant County, Texas. My present occupation is that of freight conductor for the Missouri, Kansas & Texas Railway Company of Texas and have been so engaged for about twenty years but have only been working for the M. K. & T. Ry. Co. of Texas for four years and eight months. I handled the shipment of cattle in question from South Yards at Hillsboro to New Yards at Ft. Worth. I was at that time freight conductor for the M. K. & T. of Texas. My duties as such conductor were to look after the train and all of the freight under my charge. My duties were such as are usual and customary for a freight conductor of a railway company. The cattle while in my charge moved over the M. K. & T. Ry. Co. of Texas' lines from the South Yards at Hillsboro to the new yards at Ft. Worth. This is a distance of 54 miles. It was handled by a fast service train making about the same time as a regular stock train. The train was composed of sixteen loaded cars and five empties, the highest tonnage being 584 tons while the engine was supposed to carry 1,045 tons. The only switching done at all while the train was in my charge on the road was to set out a car of stock at Itasca. This shipment of stock left the South
65 Yards at Hillsboro at 10:30 A. M. on Aug. 24th, 1912. They arrived at the new yards at Ft. Worth at 1:25 P. M. on August 24th, 1912. I know the usual and customary time it takes a train of this character to move over the said road from the South Yards at Hillsboro to the yards at Ft. Worth. The usual and customary time is about two hours and forty minutes. At that time that was the least time in which we were allowed to make the trip and that is about the usual and customary time. During the time that I was connected with the shipment of these cattle, there was no jolting, jarring or rough handling of any kind. I remember this shipment well. While on this trip from the yards at Hillsboro to Ft. Worth the train was delayed for ten minutes at Itasca in setting out one car of stock. We were delayed twenty minutes at Grandview in awaiting the arrival of train No. 209, which met us there. Outside of these two short delays we were not delayed at all. Such delays are usual and customary as you scarcely ever go through without the necessity of delaying this much. At Itasca there was no switching of the shipment of cattle because it was not necessary as the car which was left at Itasca was the head car of the train. We sidetracked at Grandview to allow passenger train No. 209 which was

going south to pass. We met this passenger train at Grandview. The cattle passed through the South Yards at Hillsboro, which is the division point, while under my observation. The cattle arrived at the south yards at 10:20 A. M. August 24th, 1912, and we moved forward with the shipment in just ten minutes from that time, making us move at 10:30 A. M. I did not have anything to do with the switching or handling of the cars in the yards at Hillsboro or South Yards. I was called for 10:20 A. M. and actually went out with the train at 10:30. I was delayed ten minutes waiting for the train. I know the usual and ordinary time that it takes a train of that character to pass through this division point. It usually takes about thirty minutes and sometimes as much as an hour.

66 The rating of the engine which pulled the train at the time I had charge of it was 1,045 tons. The greatest amount of actual tonnage pulled by the said engine was 584 tons. After the car was set out at Itasca the tonnage pulled was 564 tons. I did not make any particular examination of the cattle while they were in my charge. Two men were in charge of them. Think their names was Ward as my record shows J. R. & J. H. Ward. There were no complaints made to me of the condition of the cattle. There were no cattle down or any dead either at South Yards or at Grandview for, if so, I would have noticed them. I had no occasion to look at them at Ft. Worth and I cannot say as to their condition there except that they were up. If any had been down I would have known it. They were all up.

To the cross interrogatories prepounded the witness J. B. McNeil answered as follows:

I have been in the employ of the defendant Railway Company for four years and eight months in the capacity of freight conductor during all the time. I have had so many shipments of cattle since I have been so employed that I have no idea as to the number. I remember this shipment but I also have my train book. The record which I have was made by me and has been in my possession ever since. I am attaching the pages from my book covering this shipment. I had eight cars of cattle, seven of this bunch, and one which was left at Itasca. I had thirteen other cars between the points mentioned, five of which were empties. We did not do any local business on the run with said cattle. The distance between said points between which I handled the cattle was 54 miles. The usual and customary time made by through stock trains over the part of the road over which I handled the cattle is from two hours and forty minutes to about three hours. The usual and customary time made by through freight trains is from three to four hours. No, it is not unusual to handle the trains between those points at from twenty to twenty-five miles per hour but usually there is necessarily

67 a stop. It is usual for a waiver of the twenty-eight hour law to accompany the way bill but I do not know whether it did in this case or not. I have no record of it and do not know whether there was such waiver or not. I did not make any particular examination of the cattle but only examined them in a general way while they were in the cars. Independent of my records I do not suppose

I would remember about their condition, I know though that if any had been down my records would show it. I remember the shipment independently of my records. The cattle were not unloaded while under my charge. I do not know what was the classes or the ages of the cattle. Cattle trains can be moved either smoothly or *or*oughly. I have handled some shipments of cattle roughly and I have seen shipments handled roughly. I have also testified to the fact of the rough handling of cattle by the railroad I was working for.

The defendants Missouri, Kansas & Texas Ry. Co. of Texas and the Missouri, Kansas & Texas Ry. Co. offered in evidence the deposition of P. HETZNER, who testified in substance as follows:

My name is P. Hetzner and my age is 45 years. My place of residence is Ft. Worth, Texas, and my present occupation is foreman of a switch engine, in the employ of the Missouri, Kansas & Texas Railway Company of Texas. I have held my present position for about eight years. I had something to do with the shipment in question—I handled it in the capacity mentioned above. My duties as foreman of such engine were to have charge of the movement of the engine while engaged in its work of switching cars of freight from one point to another in and around the city of Ft. Worth. I had charge of the engine which transported these seven cars of cattle from the Katy yard in Ft. Worth to the stock yards of the same road at Hodge, Texas. The distance between these points is about six miles. I handled these seven cars of cattle between the points mentioned above and handled no other cars in con-
68 nection therewith, the*y*se being handled as a separate drag of cars by the switch engine. I left the Katy yards with these cattle at 2:30 P. M. on Aug. 24th, 1912, and arrived at Hodge with them at 3 P. M., a space of thirty minutes. An hour is the time allotted in switching cars from the Katy Yards to Hodge, Texas. I know the usual time required to make this trip. The length of time consumed by me on the occasion in question was about equal to passenger time. These seven cars of cattle were carefully handled while in my charge and there was no rough handling and no delays. They did not pass through any division point while I had charge of them. It usually takes a train of cars about an hour and sometime- longer to make the run from the Katy yards in Ft. Worth to Hodge. The rating of the switch engine with which I handled these cattle was 900 tons and the seven cars of cattle made a tonnage of about 196 tons. I saw these cattle when they were unloaded from the cars into the pens at Hodge and there were none dead.

One was down but I did not observe any injuries upon any of them. The nature of my examination of the cattle was simply to observe them as they were unloaded from the cars into the pens.

Answering the cross interrogatories of the plaintiffs the witness P. HETZNER stated:

I have been employed by the Missouri, Kansas & Texas Railway

Company of Texas, as foreman of a switch engine, about eight years. Have worked for said railway company about eleven years switching and as a foreman of a switch engine. As a foreman of a switch engine I have handled many thousand shipments of cattle. I am testifying as to the time and date when I handled this shipment from the record which I made at the time I handled same and which I delivered to the yard clerk after it had been made and from whom I got same for the purpose of refreshing my recollection. Am attaching a copy of said record. I had no other cars in this train between the Katy yards and Hodge except those seven cars
69 of cattle. My handling of the cattle was not on the road with a road engine but was merely to switch them from the Katy yards to Hodge, a distance of about six miles. I did not pay any attention to the way bills covering these cattle and do not know whether there was any waiver of the twenty-eight hour law or not. The examination I made of the cattle was to observe them as they came out of the cars into the pens and this examination was made in the day time. It is a fact that independent of my record I have no recollection of this shipment. I do not know whether there was any one accompanying these cattle, representing the shipper or not. The cattle were unloaded at Hodge for the purpose of being fed, watered and rested. Of course a train can be handled roughly or smoothly. I have seen cattle handled roughly by a switch engine but these cattle in question were not roughly handled by me. When I have been asked to testify in the past about the handling of cattle I have testified to the truth with reference to the matters inquired about.

The defendants M. K. & T. Railway Companies offered in evidence the deposition of the witness M. J. CONNELLEY, who testified in substance as follows:

My name is M. J. Connelley and my age is forty six years. My place of residence is Hodge, Texas and my present occupation is that of Stockyards foreman for the M. K. & T. Railway Company of Texas at Hodge, Texas. I have resided at my present place of residence about seven years and have been engaged in my present occupation during all of that time for said company and prior to that time I was joint stockyards foreman for the Missouri, Kansas & Texas Ry. Co. and the Texas & Pacific Railway Company at Ft. Worth, Texas. I had something to do with the shipment of cattle inquired about—handled same in my capacity of Stockyards Foreman for the M. K. & T. Railway Company of Texas, at Hodge, Texas, by which company I was employed at said time. In my duties as stock yards foreman were looking after the un-
70 loading, feeding, watering and re-loading of cattle which were unloaded for feed, water and rest at the station of Hodge and to examine the same and note their condition, making a record thereof in a book provided for that purpose. This shipment of cattle was unloaded at Hodge during my connection with same. They were unloaded at said place at 3:15 P. M. August 24th, 1912, having arrived at the stockyards at 3 P. M. on that day. All the

cars were unloaded. The cars were set for reloading at 8 o'clock P. M. of August 24th, 1912, and all of the cattle in said shipment were reloaded, the reloading being finished at 8:30 P. M. and the train taking said cattle on to their destination left the station at Hodge at 8:45 P. M., five hours and 45 minutes after their arrival at said station. The cattle were checked out of these cars as follows: S. A. & A. P. 1276 50 head, C. M. & St. P. 1175 50 head, C. E. & I. 52040 50 head, M. L. & T. 14407 50 head, S. P. 77257 37 head, S. P. 75884 32 head, S. A. & A. P. 1445 53 head. The cattle were reloaded as follows: M. K. & T. 46725 50 head, C. M. & St. P. 1175 50 head, C. E. & I. 52040 50 head, M. L. & T. 14407 50 head, S. P. 77257 37 head, S. P. 75884 32 head, S. A. & A. P. 1455 53 head. While these cattle were at my station they were unloaded and placed in pens and fed, watered and rested for a period of five hours, in compliance with the Federal Regulations. The pens into which these cattle were unloaded were the very best of railroad pens, size 54 x 36 and there was one car of these cattle unloaded into each pen. At the time I handled these cattle the pens were dry and in good condition and weather clear. I examined these cattle as they were unloaded from the cars, being present at the time they were unloaded, also when they were fed and watered and also when they were reloaded, noting the condition of the cattle at each of said times. I discovered no injuries to any of said cattle; none of them were down in the cars at the time the cars were unloaded and none dead. The cattle were in fair condition, aside from the fact that they were rather heavily loaded in the cars.

Answering the cross interrogatories propounded by plaintiffs, the witness M. J. CONNELLEY testified as follows::

71 I have been employed by the M. K. & T. Ry. Co. of Texas about seventeen years, being employed in the stockyard department as stockyards foreman. I have never been employed as a conductor. In my capacity as stockyards foreman I have handled thousands of shipments of cattle, could not begin to estimate the number. I am testifying from my record of the handling of these cattle, which was made at the time I handled the cattle, as well as from memory, as I remember this shipment of cattle in particular. I made the record from which I have testified and it has been in my possession ever since it was made. It is not a fact that a waiver by the shipper of the twenty-eight hour law accompanied the way bills pertaining to this shipment and no request to run the cattle through to destination without unloading. If such a waiver was ever signed I never saw it and do not know where it is now. I did not make any examination of these cattle while they were in the cars but examined them while they were being unloaded, after they had been unloaded and when they were being re-loaded. It was in the day time when I inspected the cattle, as they were loaded and placed in the pens. The character of my examination was to examine them with my eyes. It is not true that, independent of my records to which I have referred that I have no recollection of this shipment, on the contrary, I do remember it. I think there were

two parties accompanying these cattle, but know there was at least one man in charge of them. The cattle were unloaded by me for feed, water and rest at Hodge and at the time they were unloaded there remained but twenty minutes before the twenty-eight hours would have expired, and to have held them on the cars longer than that time would have been a violation of the Federal law, which incurs the penalties of a heavy fine against the railroad company violating the same.

72 The defendants M. K. & T. Companies offered in evidence the deposition of the witness E. E. Long, who testified substantially as follows:

My name is E. E. Long and my age is 33 years. My place of residence is Fort Worth, Texas and my present occupation is that of Stockyards foreman for the Texas & Pacific Railway Company at Fort Worth, Texas. I have lived in Ft. Worth since Jan. 20th, 1913, and during that time have been engaged in my present occupation. Prior to that time I lived in Hodge, Texas and was agent for the M. K. & T. Ry. Co. of Texas at that point for about six and a half years. I had something to do with the handling of the cattle in question, being agent of the M. K. & T. Ry. Co. of Texas at the time the cattle were unloaded, fed, watered and rested at the station of Hodge. My duties as such agent were to have charge of billing all cattle going out of the station of Hodge or feeding there and to keep a record of the cattle fed at that place, making a feed-charge way-bill covering the same. The cattle involved in this suit were unloaded at Hodge, Texas, and were fed, watered and rested there. The pens into which these cattle were unloaded were regular railroad stock pens, size 54 x 36 and they were in good condition at the time these cattle were handled at Hodge. I cannot testify as to the time these cattle were handled at Hodge, that is, when they were unloaded or when they were reloaded because it was no part of my duty to look after the unloading and reloading of the cattle, my duties requiring me to be at the office and to see after the billing of the cattle. I would not be able to swear that I saw this shipment of cattle; I may have seen them or may not. I would not attempt to testify as to the condition of the cattle when they arrived at Hodge.

Answering the cross interrogatories propounded by plaintiff, E. E. Long testified as follows:

73 I am not now in the employ of the defendant M. K. & T. Ry. Co. of Texas, being employed by the Texas & Pacific since Jan. 20th, 1913. I have testified that this shipment of cattle was unloaded at Hodge by refreshing my memory from the record made by M. J. Connelley, stockyards foreman, who handled this shipment of cattle at Hodge. The record was made by said M. J. Connelley and I suppose it has been in his possession since it was made. I do not remember whether there was a waiver of the twenty-eight hour law accompanying the way-bills covering this shipment or not. I made no examination of the cattle. I do not

remember whether there was any one in charge of them or not. I do not know anything about the handling of trains.

The defendant M. K. & T. Railway Companies offered in evidence the deposition of the witness W. F. FRAME, who testified in substance as follows:

My name is W. F. Frame and I am 35 years of age. I reside at No. 700 West Chestnut St. Denison, Grayson County, Texas and am at present employed as a railroad freight conductor in the service of the M. K. & T. Ry. Co. of Texas. I have resided at my present address for about two years, having been engaged in my present occupation for the past twelve years. At the time of this shipment I was employed by the M. K. & T. Co. of Texas and was working as a conductor for that company. My duties as such conductor were to handle trains assigned to my charge between division points upon the north Texas division of the said railroad company's lines. I at different times worked as such conductor in charge of such trains so assigned to my care between Denison, and Ft. Worth, Dennison and Dallas, Denison and Wichita Falls. I handled the shipment in question between Hodge, Texas, and Denison, Texas. It is ninety-two miles between said points. The cattle moved from Hodge to Denison in a freight train—a fast service freight train, in which train only these seven cars
74 of cattle were handled. We left Hodge with these cattle at about 9:00 o'clock P. M. Aug. 24th, 1912, and we arrived at Denison with them at 1:50 Aug. 25th, 1912. I know the usual and ordinary time it takes a train of the same character as the one in which these cattle were handled by me to go between said points. The usual and ordinary time is about five or six hours. The cattle received good handling while in my charge. They were not delayed between Hodge and Denison and met with no accident or derailment, were not switched as these seven cars were the only cars handled in said train between Hodge and Denison. There was no jolting or jarring other than that which necessarily accompanies the transportation of cattle by train, due to the slack between cars which is absolutely necessary. I do not remember taking side track with this train at any point enroute. The cattle did not pass through any division points while in my charge. The rating of my engine on said trip was 870 tons but the weight moved was only 214 tons. I just looked at these cattle in the cars before we left Hodge—just looked into the cars as I passed along down the side of the train, taking car numbers and seals. When I looked at these cattle they had just been fed, watered, rested and reloaded and were in good condition with none down. They were stock or range cattle going to Oklahoma pastures for feed; they were not fat cattle.

Answering the cross interrogatories propounded by the plaintiffs W. F. FRAME testified as follows:

I have been employed for the past twenty or twenty-five years, at first in freight office at Ray and Denison, Texas, and for the

past fifteen years in train service—three years as a brakeman and twelve years as a conductor, all in the service of the M. K. & T. Ry. Co. of Texas. I have been employed as a conductor for the past twelve years and I have handled hundreds of shipments of cattle during the time I have been so employed—I cannot
75 say just how many. I am testifying from memory. The train consisted only these seven cars of stock and the caboose all the way between Hodge and Denison. I did no local business on the trip. It is 92 miles between Hodge and Denison, the points between which I handled these cattle. Five to six hours is the usual and ordinary time for through stock trains over the road I handled this stock—that is, fast service freight trains or stock trains make the run in five or six hours, while through trains handling only dead freight, or no perishable freight or stock consume eight to ten hours in making the same run. It is not usual for stock trains or through freight trains to make that run at from twenty to twenty-five miles an hour. Twenty miles an hour is the maximum speed limit for all freight trains over the joint track between Ft. Worth or Hodge and Whitesboro. I do not remember about whether a waiver of the twenty-eight hour law was attached to the waybill. I looked into the cars at these cattle at Hodge while I was working along side of the train taking my car numbers and making a record of the seals. This was during the night time. I do not remember whether or not there was any representative of the shipper in charge of the stock. It is possible to handle stock trains smoothly or roughly but I have never seen cattle handled roughly. I have never been in an accident where cattle were involved.

By agreement of counsel for plaintiffs and defendants the record of the shipment was introduced, showing that the cattle in question arrived at Denison at 1:50 A. M. August 25th, and left at 2:50, remaining an hour at Denison. The record also showed that the cattle arrived at North McAlester at 6:50 A. M. on the 25th of August, the distance being 97 miles or at the rate of 24 miles an hour.

76 The defendants M. K. & T. Companies offered in evidence the deposition of W. W. FULLER, who testified in substance as follows:

My name is W. W. Fuller and I live at North McAlester, Okla., where I have lived for the last eight years. I am forty two years of age and have been engaged as a conductor on the M. K. & T. Railway for the last seven years. I was the conductor on train No. 4/404 of August 24th, 1912, on the M. K. & T. Railway, which handled a shipment of seven cars of cattle from North McAlester to Muskogee, Okla., on said date. The number and initial of cars containing this shipment of cattle were M. K. & T. 40728, S. M. & S. P. 1175, C. & E. I. 52040, M. L. & T. 14407, S. P. 77757, S. P. 75884, S. A. & A. P. 1445. My train left North McAlester at 8:05 A. M. and arrived at Muskogee at 11:00 A. M. of Aug. 25th, 1912. I was delayed at McAlester ten minutes testing air, 25 minutes at

Checotak loading stock and 15 minutes at McAlester waiting for train No. 1, being a delay of 50 minutes all told. As stated above said cattle moved from North McAlester to Muskogee on the M. K. & T. in my charge, the distance between said points being 61 miles and my train is a fast service train. My records show no other delays than those mentioned above and they show no rough handling. Any delay, sidetracking, etc., out of the ordinary is always noted in my train book and in this case I have no such record. I did not pass through any division points while the cattle were in my charge so there were no delays from this cause. The rating of our engine was 880 tons and the tonnage of our train on said trip was 864 tons. I can find no notation in my train book as to anything being wrong with this shipment. When we find any cattle down in a train or in bad condition we always make a notation on the book, but, as stated above, I have no such notation.

Answering cross interrogatories propounded by the plaintiffs, the witness W. W. FULLER testified as follows:

I have been employed by the M. K. & T. Ry. Company for about seven years in the capacity of conductor. Do not know
77 how many shipments of cattle I have handled during that time. I am testifying from my records which have been in my possession since the time I made them. I had thirteen cars of cattle in my train on said date between North McAlester and Muskogee and unloaded one car of cattle at Checotah, which was the only local business done on the trip. The distance between said points is 61 miles. The usual time for through stock trains between North McAlester and Muskogee is about two hours and fifty minutes and it is not unusual to make the distance at the rate of twenty five miles per hour. We made about twenty eight miles per hour on this trip not including the delay of 25 minutes at Checotah loading the car of cattle. My record shows no thirty six hour release attached to way bill. I do not remember making any examination of this shipment of cattle and the record does not show any notation which is made when anything is wrong with a shipment. I always examine my train when departing and anything wrong with a shipment is noted accordingly. I have no record of rough handling of the train containing this shipment.

The defendant M. K. & T. Companies offered in evidence the deposition of the witness J. F. SANBORN, who testified substantially as follows:

My name is J. F. Sanborn and I am 42 years of age. My residence is Muskogee, Okla., and I am stockyard foreman for the M. K. & T. Ry. Co. at Muskogee, Okla. I have lived at Muskogee for thirteen years and have been employed by the M. K. & T. Ry. for about 12 years last past. As above stated I was employed by the M. K. & T. Railway Company in August, 1912, and as foreman of the stockyards at Muskogee I handled the shipment in question, consisting of seven cars of stock—I superintended the handling of this shipment. It was unloaded here at 1:00 P. M. Aug. 25th

1913, having arrived at Muskogee at 10:55 A. M. The stock was fed and watered here and reloaded at 9:05 of Aug. 26th,
78 leaving Muskogee at 9:15, Aug. 26th. The cattle was set at the pens at 12:40 P. M. There were 323 head of cattle unloaded here and the same number reloaded into the cars.

The number of cattle placed in each pen ran from 37 to 50 head. The pens were in good condition at the time and are made to accom-odate comfortable fifty head of grown cattle and a greater number of smaller cattle. I do not remember of any cattle being in bad condition in this shipment. The records show that the cattler were in good condition and had any been dead, *dead*, down, bruised, etc., a record of same would have been made in our books. The only examination I made of the cattle was watching them go in and out of the cars and pens, when they seemed all O. K.

Answering the cross interrogatories propounded by plaintiff, the witness J. F. SANBORN testified as follows:

As stated above I have been employed by the M. K. & T. Ry. Co. for about twelve years in the capacity of Assistant Stockyard Foreman and later as stockyard Foreman at Muskogee. I am testifying from my records as I made them myself at the time and dates stated. Said records have been in my possession ever since they were made. Below is a copy of my record.

"8-25-1912.

8/23 J. R. Ward.
H. J. H. Ward.

87.	40778 M.	50	50	50
88.	1175 C. M. & St. P.	50	50	50
89.	52040 C. & E. P.	50	50	50
90.	14407 M. L. T.	50	50	50
91.	77257 S. P.	37	37	37
92.	75884 S. P.	32	32	32
93.	1445 S. A. P.	53	52	52

The first row of figures refer to the W./B. numbers and the last two rows of figures are the cattle checked out of cars and the
79 cattle checked in. The first of the three rows is the billing. I did not handle this train as conductor. There was no waiver of the 28 hour law attached to these W./B.'s. There was one man in charge of this shipment representing the shipper but I do not know his name. The cattle were unloaded here to be fed and watered. They were yearlings, that is, five cars and two cars of cows and steers mixed.

The defendants M. K. & T. Companies offered in evidence the deposition of L. E. PITCHFORD, who testified in substance as follows:

My name is L. E. Pitchford and am thirty-five years old. My residence is Muskogee, Okla., and I am assistant Stockyard foremen for the M. K. & T. Ry. Co. at that place. I have lived at this place

for ten years and have been employed continuously by said company for the last four years. On Aug. 25, 1912, I was employed by the M. K. & T. Ry. Co. at Muskogee as Assistant Stockyard foreman and in such capacity assisted in the unloading and reloading, feeding and watering of the shipment of cattle from Llano to Wynona, consisting of seven cars of cattle. I counted the cattle back into the cars from the pens and called off the number in each car to my foreman, Mr. Sanforn, who took the numbers down as I called them off to him. I did not make any notations or records in this case. I cannot remember definitely about this particular shipment but I know that the pens were in good condition at this time. I do not remember of making any special examination of this stock. When any stock is dead, injured, bruised, etc., a notation of such condition is made in our records and the records do not show any such notation. I could not state how many shipments of cattle I have handled during the last four years I have been assistant stockyards foreman at Muskogee. As I did not make any of the records of this shipment, all I know is from memory.

80 The defendants M. K. & T. Companies offered in evidence the deposition of the witness B. K. ROBERTS, who testified in substance as follows:

My name is B. K. Roberts and I live at 803 North "C" street, Muskogee, Okla., where I have lived for the last two years. I am forty years of age and have been engaged as a conductor on the M. K. & T. Ry. for the last ten years. I was the conductor on train No. 536 of Aug. 26th, 1912, on the M. K. & T. Railway, which handled a shipment of seven cars of cattle from Muskogee to Osage, Okla., on such date. The number of the cars containing this shipment of cattle were M. K. & T. 40728, C. M. & St. P. 1175, C. & E. I. 52040, M. L. & T. 14407, S. A. & A. P. 1445, S. P. 727257, S. P. 75884. My train left Muskogee on time at 9:15 A. M. and arrived at Osage at 6:45 P. M. of Aug. 26th, 1912. There are no exceptions noted on my record as to any delays of my train. The distance between Muskogee and Osage is 84 miles and my train is the local freight train between said points. The ordinary and usual time for the local freight between said points is about nine hours. My record shows no exceptions as to delays, rough handling or sidetracking. Any delay, sidetracking our of the ordinary is always noted in my train book and in this case I have no such record. The train carrying the shipment in question did no- pass through any division point between Muskogee and Osage—consequently there was no divisional point delays. The rating of our engine was 1,030 tons and the tonnage of our train on said trip 920 tons. My record shows no notation as to the condition of said shipment of cattle. It is customary to make a notation on my book when anything is wrong but there is nothing in my book that would indicate anything wrong with this shipment. I could not say how many shipments of cattle I have handled during the ten years I have been conductor.

Answering the cross interrogatories propounded by the plaintiff B. K. ROBERTS testified as follows:

81 I am testifying from my records which have been in my possession since the time I made them. Had only seven cars of live stock in our train on that date and twenty-one others cars and did local business between Muskogee and Osage at the following points: Porter, Coweta, Jackson, Broken Arrow, Tulsa and Indian. Through freight trains would go over this division in about five hours and in stock seasons through stock trains are handled between Muskogee and Osage, the rate being about twenty miles per hour. I have no record of any waiver of the twenty-eight hour law accompanying this shipment and if such accompanied the waybills I do not know where it is now. I do not remember making any examination of this shipment of cattle and the record does not show any notation which is made when anything wrong happens to a shipment. I have no record of rough handling of the train carrying this shipment.

The defendants M. K. & T. Companies offered in evidence the deposition of the witness C. E. POSH, who testified substantially as follows:

My name is C. E. Posh and I am forty-five years of age. I live at Parsons, Kansas and have lived there for seven years. I am a conductor on the railroad and have been such for thirty years. As to whether I handled the shipment in question, my records show that I handled S. A. & A. P. car No. 1445 and six others destined to Winona on Aug. 26th, 1912. Iwas employed by the Missouri, Kansas & Texas railway as conductor at that time—conductor to run the train only. If the car numbers show that I had the shipment in question I moved it from Osage, Oklahoma to Winona. We left Osage at 8:20 P. M. and got to Winona at 9:30 P. M. The distance is nineteen miles and the train I had was a stock train. The time I made is about the average running time—twenty miles an hour. There was no delay or rough handling to the shipment and it did not go through any division points while in my charge. I do

82 not know about what time it got to Osage but I suppose about twenty or thirty minutes before I left—it takes them about that length of time to get them through a terminal. A conductor has it just from one terminal to the other and does not handle the train when it is in a terminal. My engine was rated at ten hundred and fifty tons and I had two hundred and thirteen tons. I did not examine the cattle except when they were unloaded at Winona. The cattle arrived in good order and I do not know that any were dead, down or bruised up.

Answering the cross interrogatories propounded by plaintiffs E. C. POSH testified as follows:

I have been employed seven years as a conductor and fifteen or twenty years by the defendant M. K. & T. Railway Company. I do not know exactly how many shipments of cattle I have handled since I have been employed but I expect four or five hundred. I am not testifying from memory alone; I have referred to my train book

which I made myself on the 26th day of August, 1912. This record has been in my possession ever since it was made. I only had seven cars of cattle in my train and these were the only cars of any kind I had. I did no local business on this run—a distance of nineteen miles. Twenty miles an hour is the usual and ordinary time made by through stock trains over the part of the road I handled these cattle. Through freight trains usually and ordinarily make fifteen or eighteen miles an hour. It is not unusual for full stock trains or freight trains to make twenty to twenty-five miles an hour over this part of the road. It is true that a waiver by the shipper of the twenty-eight hour law accompanies the way-bills of this shipment and a request to run the cattle on to destination without unloading. I do not know where the way-bills are; I suppose with the agent at Winona—it was turned over to him and I do not know what became of it. The cattle were at Winona when I examined them. I examined them at night after they were unloaded. To see that
83 there was none down, dead or crippled was all the examination I made of them. It is true that I have no recollection of this shipment independent of my records. I could not say as to whether any person or persons was accompanying this shipment—I do not keep any record of that. The cattle were unloaded at Winona, their destination, for grazing purposes. As to what classes and ages the cattle were, I lost the record. Cattle trains can be handled either smoothly or roughly. I have handled cattle shipments roughly. Rough treatment of cattle shipments occurs frequently on the railroad I am working for but I have never testified to that fact.

The defendant Houston & Texas Central offered and read in evidence the contract of shipment from Llano to Elgin, as follows:

Houston & Texas Central Railroad Company.

NOTICE.—Shippers have the choice of two forms of contract for shipment of live stock, viz: Form 775, which limits the liability of carriers in consideration of a lower rate being granted than that which applies on shipments made at carrier's risk; Form — on which shipments are accepted at carrier's risk, at a rate greater than that provided for shipments made under a contract limiting the carrier's liability. No station Agent of this Company has any power or authority to bind this company, in regard to shipments of live stock, except by contract in writing, on either of the above mentioned forms. No agent has authority to change or modify these forms.

This Bill of Lading is given subject to correction as to rate weight and classification, so as to conform to the rates, rules and regulations prescribed by the Railroad Commission of Texas, and to the rates rules and regulations adopted, according to law, for interstate shipments.

84 *Live Stock Contract.*

Limiting the Liability of Carriers.

Initials. Car No. No. of Head.
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Executed at Llano Station Aug. 23, 1912. This agreement, made between the Houston & Texas Central Railroad Company, party of the first part and J. R. Ward, party of the second part.

Witnesseth: That for the consideration and the mutual covenants and conditions herein contained, said first party will transport for the said second party the live stock described below, and the parties in charge thereof as hereinafter provided viz: Seven cars, initials and numbers of which are shown in margin way-billed from Llano to Wynona to —— —— W. B. Series — Nos. —— dated 8/2, 1912, said to contain —— head of ———— from Llano station, on the line of said first party to Elgin Station, the end of the line of road operated by said first party, on the route over which such stock are way-billed, there to be delivered to consignee or transferred to the Railway Company over which said live stock are way-billed for further transportation by said Railway Company, said live stock being consigned to J. H. Ward and the party of the first part covenants and agrees that the freight charge from point of shipment to final destination shall only be at the rate of ———— per ————, the same being a through rate, lower than the local rates which might lawfully be charged for shipments transported at carrier's risk; and in consideration of said reduced rate; and other considerations, it is mutually agreed between the parties hereto as follows:

First. Said second party hereby releases said first party from any and all liability for delay in shipping said stock accruing before delivery thereof to its agent, and from any delay in receiving the same after being tendered to its agent.

Second. That the live stock covered by this contract are not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular mar-
85 ket. That said second party accepts for use in the transportation of said stock the cars tendered him by said first party, and agrees that they are in all things satisfactory to him, and that they are suitable and proper for use in transporting said stock.

Third. The said first party is hereby exempted from liability for loss or damage arising from derailment, collision, fire, escap-ment from cars, heat, suffocation, improper loading, overloading, crowding, maiming, robbery, or from any of said live stock being vicious, wild, unruly, or weak, or from injuring of any of said live stock by each other or themselves, or from loss or damage from any other cause or thing not resulting from the negligence of said first party or its agents or employes, and in no case shall negligence on the part of said first party or its agents or employes be assumed, but the same must be proved by said party of the second part.

Fourth. The said second party will load, unload and reload said

stock at his own risk, and feed, water and attend to the same at hi
own expense and risk while they are in the stock yards of said firs
party awaiting shipment, and while on the cars or at feeding o
transfer points, or wherever they may be unloaded for any purpos

Fifth. Said first party is exempted from liability for loss or dam
age caused by any mob, strike or stoppage of labor, or by any actua
or threatened violance to persons or property from any source.

Sixth. Said second party will, at his own risk, see that said stoc
are securely and properly placed in the cars furnished, and that th
cars are safely and properly fastened so as to prevent the escape o
said live stock therefrom.

Seventh. In case said first party shall furnish laborers to assi
in loading or unloading said stock at any point, such laborers sha
be subject to the orders of the person representing the shipper i
charge of said stock, and shall be deemed employees of the part
of the second part while so assisting, and said party of th
86 first part shall be exempted from liability on account of a
unskillfulness or negligence on the part of said laborers whi
so engaged.

Eighth. In case said party of the first part should for any reaso
undertake to water or feed said stock it shall not be liable for insuf
cient supplies, nor for the imperfect discharge of such undertakin
it being expressly understood that the same is not a duty impos
upon it as a carrier of said stock.

Ninth. Said second party expressly agrees, as a condition prec
dent to his right to recover or maintain suit for any damages for an
delay, loss or injury to said live stock during the transportatio
thereof, or previous to the loading thereof for shipment, that he wi
give definite written notice of his claim therefor to some gener
officer or agent of said first party, as soon after the occurrence
such loss, damage or injury as circumstances will permit, and th
should he fail from any cause, to give the party of the first part sa
notice within ninety days from date of loss, damage, delay or i
jury to said stock, his failure to do so shall be a complete bar to h
recovery of any and all such claims.

Tenth. It is further stipulated and agreed that if the live sto
mentioned herein are to be transported over the roads of other ra
way companies, the said first party is only to transport said stock
the aforesaid station named at the end of its line on the route ov
which said stock are to be shipped, it being understood and agre
that said first party assumes no liability as to said shipment beyo
its own line, except to protect the through rate, and that it shall
no manner be responsible or liable for any loss, injury or delay
or to said stock, or in the transportation thereof after the same ha
left its line, nor shall it, in any sense, be responsible for the carria
of said stock beyond its own line, nor shall any other carrier acce
ing said stock for transporta-ions under this contract be liable f
any loss, injury or delay not occur-ing on its own line.

87 Eleventh. In case of total loss of any of the live sto
covered by this contract from any cause for which said first
shall be liable, it is agreed that the value thereof is the actual ca
value of the same at the time and place of shipment, but in no c

to exceed $100.00 for each horse, mare, pony, gelding, stallion, mule or jack, $50.00 for each ox, bull or steer; $30.00 for each cow; $10.00 for each calf or hog; $3.00 for each sheep or goat; and in case of injury or partial loss, the amount claimed shall not exceed the same proportion.

Twelfth. That this contract does not entitle the holder thereof, or any other person, to ride on any train except for the purposes, and in accordance with the conditions printed on the back hereof, all of which are agreed to be a part of this contract, nor to ride in the cars of any train except that in which the live stock covered by this contract are transported, nor to return passage from —— to —— unless this contract is presented within — days from date hereof, to the properly authorized agent of the first party, for return pass, as shown on reverse side hereof, which pass, when properly obtained as above, shall be used within twenty four hours after the day and hour issued, and by such person or persons only whose names are written on reverse side hereof, and who actually accompany said live stock for the purpose of caring therefor, and shall not include women, children or other persons unable to perform the services of caring for live stock in transit, as required by this contract, and persons entitled to return passage under the terms of this contract shall perform the journey within — days from the date of return pass.

Thirteenth. That the person or persons in charge of the live stock covered by this contract shall remain in the caboose car attached to the train carrying such stock while the same is in motion; that whenever such person or persons shall leave the caboose car, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever; and that the said
88 first party shall not be required to stop or start its train or caboose car at or from depots or platforms, or to furnish lights for the accommodation or safety of such persons.

Fourteenth. The said second party hereby releases and waives any and all causes of action for damages that may have occurred to him by any written or verbal contract, relating to said live stock, or the transportation thereof, made prior to the execution hereof, and any such contract is hereby cancelled.

Fifteenth. That no suit or action against the party of the first part for recovery on any claim for loss, injury, damage or delay to said stock, or for any cause of action growing out of this contract, or the transportation of said live stock shall be maintainable in any court of law or equity, unless such suit or action be commenced within two years next after the damage shall occur, and should any such suit or action be commenced against said party of the first part after the expiration of the aforesaid two years, the lapse of time shall be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Sixteenth. It is further agreed that any person other than said second party who may accompany said stock, being furnished free transportation at the request of said second party for that purpose,

is the agent of said second party in all matters touching the care, management, transportation or disposition of said stock during said transit, and at the point of destination. It is further understood that any delay in the transportation of said live stock on account of quarantine regulations or on account of any action, ruling or requirements of any quarantine agent or officer shall be at the risk and expense of said second party, and said first party shall in no case be liable for any injury, damage or loss which may result therefrom.

Seventeenth. It is further agreed that no person, except the owner of said live stock, or his duly authorized agent in the name of
89 the owner, shall be allowed to sign this contract, and that in making this contract, said second party guarantees that he is the owner of the stock mentioned herein, and expressly acknowledges that he has had the option of making the shipment under the tariff rates, either at carrier's risk or upon a limited liability, and that he has selected the rate and liability named herein and expressly accepts and agrees to all the stipulations and conditions herein named.

Eighteenth. It is further agreed that the evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the printed stipulations, rules and regulations on the back hereof, all of which shall constitute a part hereof, fully assents and agrees to each and all of the same, is his signature hereto by himself or his duly authorized agent.

Executed in triplicate, each copy of which is to have the force and effect of originals.

E. O. TARROW,
Agent for Houston & Texas Central Railroad Co.
J. R. WARD, *Shipper,*
By —— ——, *Agent.*

Witnesses:
—— ——.
—— ——.

(To be other than the parties hereto or their agents.)

Houston & Texas Central Railroad Company.

Drovers' Pass.

We, the undersigned persons, in charge of the live stock mentioned in the within contract, in consideration of a free pass granted us by the Houston & Texas Central Railroad Company and of the other covenants and agreements contained in such contract, and those printed on the reverse side hereof, all of which for the considerations aforesaid are hereby accepted by us and made a part of this, our contract, all the terms and conditions of which we agree to observe and be severally bound by, do hereby agree that during the time we are in charge of said stock, and while we are on or

return passage shall be deemed employes of said company for
90 the purposes in said contract stated, and that we do agree to assume and hereby assume all risk, incident to such employment and that said company shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employees.

Signature- of parties entitled to return transportation:

—— ——.
—— ——.
—— ——.
—— ——.

Pass parties whose names are signed above in charge of the live stock described in the within contract, on freight trains only.

From.....

To.....

—— ——, *Agent.*

NOTE.—Agents will make contracts in triplicate, giving one to shipper sending the other to the General Freight Agent, and retaining one for station file.

NOTICE.—This return pass must be carefully filled out by the agent of the Houston & Texas Central Railroad Co. at destination, if destination is on the line of this road, and if destination is beyond the line of this road, then by the agent at the station which is the end of the route of the shipment on this road, to whom this contract must be presented by the party or parties, entitled to return transportation.

Drovers' Return Pass.

Issued by the Houston & Texas Central Railroad Co.

Good for Continuous Passage Only.

We, the undersigned persons, do hereby certify, that we are the parties who were actually in charge of, and accompanied, the live stock described in the within contract, and whose signatures appear on the Drovers' Pass printed on reverse fold hereof, and we do also hereby acknowledge we are familiar with all of the terms
91 and conditions of this contract; that we fully agree thereto, and further agree to sign our names or otherwise identify ourselves whenever called upon by agents or conductors to do so.

Signatures of parties entitled to return transportation

—— ——.
—— ——.
—— ——.
—— ——.

NOTICE.—If this pass is found in the possession of any parties other than those who actually accompa*by* the stock, and whose signatures are shown above, it becomes the property of the Company, and Agents or Conductors will take it up and collect full fare.

Issued at ——, ——, —, 191–, hour of — — M.

Passenger Conductors will pass parties whose names are signed above from —— to —— if presented within twenty-four hours after date and hour of issue.

—— ——, *Agent.*

Instructions to Conductors.

For the purpose of further identification conductors will require parties presenting this pass to sign their names in space provided below, and compare signatures with those shown above and in Drovers' Pass printed on reverse fold.

Signatures of parties entitled to return transportation:

—— ——.
—— ——.
—— ——.
—— ——.

SPECIAL NOTICE.—Owners of live stock or their assistants will be furnished free transportation only in accordance with rules and regulations published in current Live Stock Tariffs.

92 We, the undersigned attorneys for plaintiffs and defendants in the above numbered and entitled cause hereby agree that the foregoing forty-six (91) pages contain a true and correct statement of all the material facts adduced in the trial of said cause at the Spring term of the District Court of Llano County, Texas A. D. 1913.

(Signed) F. J. JOHNSON,
Attorney for Plaintiffs.

(Signed) FISET & McCLENDON,
W. B. GARRETT,
Attorneys for Defendants.

Approved and ordered filed this 29th day of May, 1913.

(Signed) CLARENCE MARTIN,
Judge 33rd Judicial District of Texas.

THE STATE OF TEXAS,
County of Llano:

I, S. E. Hargom, Clerk of the District Court within and for the County and State aforesaid do hereby certify that the within is the original Statement of Facts as adduced upon the trial of cause No. 1858, Wherein J. H. and J. R. Ward are plaintiffs and Houston

Texas Central Railroad Company et al. are defendants, and is by me delivered to Fiset & McClendon Attorneys for the Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company, to be filed with the transcript in the court of Civil Appeals for the Third Supreme Judicial District of Texas.

Given under my hand and seal of office at Llano, this 5th day of June A. D. 1913.

[SEAL.]

S. E. HARGON,
Clerk District Court, Llano County, Texas.

Endorsed: Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin, Texas, July 19, 1913. R. H. Connerly, Clerk. Filed June 2nd, 1913. S. E. Hargon, Clerk Dist. Court, Llano Co. Texas, by —— ——, Deputy.

93

No. 5282.

MISSOURI, KANSAS & TEXAS RAILWAY CO. et al., Appellants,
vs.
J. H. and J. R. WARD, Appellees.

Appeal from the District Court of Llano County.

Opinion.

This suit was brought by appellees against the Houston & Texas Central Railroad Company, the Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company, to recover damages sustained to a shipment of cattle over the lines of said companies from Llano, Texas to Winona, Oklahoma, alleging that said companies owned lines of railroad, which together formed a connecting, through and continuous line from Llano, via Elgin and Denison, to Winona, over which they were engaged in transporting passengers, livestock and freight and that the last two named companies were partners that on the 23rd day of August, 1912, they delivered in good condition seven carloads of cattle, consisting of 245 steer yearlings and 51 cows at Llano, Texas, to the first named company at its shipping pens, to be transported by it and said connecting lines to Winona, where they were to be put upon pasture and fattened, and which were received by said first named company, which routed same, giving through rate, over the several lines of said companies, via Elgin, and Denison, to Winona, which rate was paid to said first named company by appellees at the time of shipment, whereby it became the duty of said Railway Company to safely transport with reasonable dispatch said cattle to said point; but by reason of their negligence, rough handling and delay, said cattle were seriously injured to plaintiff's damage.

The Houston & Texas Central answered denying liability on the ground that said cattle were shipped by it under special contract, wherein it was stipulated that they were only to transport same from

Llano to Elgin, and there deliver same to appellees, or under
94 their direction to its connecting carriers; that it was not required to transport the same in any definite time, and that said cattle were carried with ordinary care and reasonable dispatch, and were delivered to appellants in good condition, and that it was guilty of no act or omission in any way contributed to the injury of said cattle.

The other two companies, after general demurrers, general denial and denial of partnership under oath, plead specially that they received and shipped said cattle over their lines of railroad from Elgin to Winona by virtue of a bill of lading, which, among other things, required as a condition precedent to appellees' right to recover that they should present to and file with some agent of the Company sought to be held, a verified claim in writing, stating the amount thereof, and that no such claim for damages was ever filed by appellees with either of said Companies, which clause in said bill of lading was plead in bar of Plaintiff's right to recover herein.

There was a non-jury trial, resulting in a judgement in favor of the Houston & Texas Central Railroad Company, but appellees recovered in different amounts against each of the last named Companies, from which judgement they have prosecuted this appeal.

The evidence shows that this shipment left Llano about noon of the 23rd of August, and arrived at Winona at about nine o'clock at night on the 26th of said month. The cattle were damaged en route by delay and rough handling on the part of the appellants, and defective condition of the cars. If the cattle had been shipped with ordinary dispatch, they ought to have arrived at their destination within from thirty-six to forty-five hours, whereas, they were over eighty-one hours on the road. It is shown that the ordinary speed of such train was from fifteen to twenty miles per hour.
That this train only made from seven to eight miles per
95 hour. The cattle, on account of this delay and the rough handling and jerking, were badly skinned up, badly injured, many horns knocked off, seven of them died en route and the rest of the shipment were in very bad condition upon their arrival, and could not be driven from the vicinity of the station for seven or eight days thereafter. No injury is shown, however, to have occurred on the line of the first named Company; hence the finding in its favor. What is known as the 28-hour law was waived by the Plaintiffs. Notwithstanding this, however, the cattle were delayed for feed and water at Fort Worth more than five hours, and subsequently were delayed for the same purpose at another place en route for twenty-two hours. There was no allegation and proof that the stipulation set up by appellants in their answer is contained in the contract executed by the initial carrier, the Houston & Texas Central Railroad Company, and in fact, said contract does not contain any such stipulation. The undisputed testimony establishes the fact that this was an Inter-State shipment; that appellees made the contract with the Houston & Texas Central Railroad Company to transport this shipment from Llano, Texas, to Winona, Oklahoma over its lines and those of its connecting Companies; that appellees paid all the freight charges to said first named Company, which was

a through rate to be participated in by it and the other two carriers, and received from it a receipt or bill of lading for such through shipment. The undisputed testimony likewise shows that in this shipment, the appellants were the intermediate or connecting carriers, and that the contract containing the stipulations plead and set up by appellants was made and executed while said shipment was in course of transportation. Appellees failed to comply with said stipulation, and in fact, rely for recovery entirely upon their contract with the Houston & Texas Central Railroad Company. So that the principal question raised by this appeal is that urged in the first assignment, to the effect that the court erred in rendering
96 judgment against appellants, because under the pleadings and uncontradicted evidence, whatever claim plaintiffs have, if any, against said appellants or either of them, was barred and not enforcible, for the reason that plaintiff had failed to comply with the stipulation in the bill of lading providing that they should file within thirty days after the happening of the injuries or delays complained of, with some freight or station agent or appellants, their written and duly verified claim therefor, giving the amount which provision of said bill of lading was valid and enforcible under the laws of the United States governing and regulating inter-state commerce.

Appellees however, contend, by their counter-proposition thereto, that this being an interstate shipment, the contract of the initial carrier fixes the liability of the parties executing the contract, as well as that of the intermediate and connecting carriers, and under the Law such connecting carriers become the agents of the initial carrier, and are charged with the duty of carrying out the contract of their principal with no right or power to engraft new conditions or stipulations on the contract already lawfully made and executed, binding them to fully perform their part of the contract of carriers under the terms of said contract; and the trial court did not commit any error in holding that the appellants were bound by such initial contract, and that the contract and stipulations executed and set up by appellants as a defense in this case was an act and attempt to exempt and avoid carrier liability, and was in direct violation of section 20 of the interstate commerce act generally referred to as the Carmack Amendment, citing in support of such contention the following cases, Atlanta C. L. R. Co. versus Riverside Mills, 219 U. S. R. 186; Kansas City S. R. Co. versus Carl, 227 U. S., 639; Adams Express Co., versus Croninger, 226 U. S. 491; Railway Co. versus Latta, 226 U. S., 519; Railway Company versus Miller, 226 U. S. 513; Railway Co. versus Harriman Brothers, 227 U. S. 657; Atchison, T. & S. F. Ry. Co. versus Word, 159 S. W. 375; Mo. Pac. Ry. Co. versus Cheek, et al., 159 S. W. 627; Pecos & N. T.
97 Ry. Co. versus Meyer, 155 S. W. 427; Chicago R. I. & G. Ry. Co. versus Scott, 156 S. W. 294.

A careful reading of the above authorities convinces us of the correctness of appellees' contention. The original interstate commerce Act of February 4, 1887, was amended by the act of June 29th, 1906, (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288.) The amendment to the 20th section of said act,

known as the Carmack Amendment, reads as follows: "That any common carrier, railroad or transportation Company, receiving property for transportation, from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation Company, to which said property may be delivered or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation Company from the liability hereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company, on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgement or transcript thereof."

Mr. Justice Lurton, in Adams Express Company versus Croninger, supra, in passing upon a phase of said case involving this amendment says "The significance and dominating features of the amendment are these: First: It affirmatively requires the initial carrier to issue a receipt or bill of lading therefor when it receives property for transportation from a point in one state to a point in another.

Second: Such initial carrier is made liable to the lawful
98 holder thereof for any loss, damage or injury to such property caused by it. Third: It is also made liable for any loss, damage or injury to such property caused by any common carrier, railroad or transportation company to which said property may be delivered, or over whose line or lines such property may pass. Fourth: It affirmatively declares that no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

In construing this act the same learned justice in Atlanta C. L. R. Co. versus Riverside Mills, supra, at p. 186 says "The indisputable effect of the Carmack Amendment is to hold the initial carrier engaged in interstate commerce and receiving property for transportation from a point in one State to a point in another State, as having contracted for a through carriage to the point of destination, using the lines of the connecting carriers as its agents." Again on page 199 of 219 U. S. (P. 167 of 31 Sup. Crt. 55 L. ed. 167, 31, L. R. A.—N. S.—) of the above report, the court said "Along with this singleness of rate and continuity of carriage, there grew up the practice of receiving carirers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier, for the purpose of carriage, would become the agent of the primary carrier. The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go, a separate agreement, limiting the carrier liability of each se-

rate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the package might, and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment; but here in turn he might be met by proof of
99 safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged, and had no access to the records of the common carriers who in turn had participated in some part of the transportation, he was compelled, in many instances, to make such settlement as should be proposed. This burdensome situation of the shipping public over routes including separate lines of carriers, was a matter which Congress undertook to regulate."

This court further says on page 205 of 219 U. S.; p. 169 of 31 Sup. Crt. 55 L. ed., 157, 31 L. R. A., (N. S.) 7; "Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state to be transported to a point in another, involving the use of the connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence."

In Atchison, Topeka & Santa Fe Railway Co. vs. Word, supra, where a similar question to the one here presented was involved, Mr. Justice Huff of the Amarillo Court of Civil Appeals, said; "If the Ft. Worth & Denver Railway company was a principal in making the contract for a through shipment, and received the consideration therefor, the act of the Santa Fe procuring the contract for such shipment over the same route, was, as we think, without consideration and contrary to law. It was but the agent of the Denver road, and under the law was charged with the duty of carrying out the contract of its principal, with no right or power to engraft new conditions and stipulations on the contract already lawfully executed, binding it to fully perform its part of the contract of carriage under the terms of said contract. Stipulations in
100 the contract of the initial carrier were ineffectual in so far as not authorized by the interstate commerce act, whether for its benefit or that of the intermediate carrier. Any provision valid in the initial carrier's contract for its own benefit will therefore enure to the benefit of the connecting carrier", citing Kansas City S. R. Co. vs. Carl, 227 U. S. 639, 33 Sup. C'rt 391. In that case it is said: "The liability of any carrier in the route * * * for loss or damage is that imposed by the act as measured by the original contract of shipment, so far as it is valid under the act." Citing Adams Express Co. vs. Croninger, Supra, and the other cases relied upon by appellees. Concluding he says: "It will be seen from

the above authorities that the contract of the initial carrier is one fixing liability of the parties executing the contract as well as that of the connecting carrier. It follows that any contract made or atempted to be made by the intermediate carrier has no binding effect with reference to the shipment while in the course of transportation. The case of Railway vs. Carl (supra) appears to be authority for the shipper to sue the intermediate carrier direct. Ry. Co. vs. Ray, 127 S. W. 281; and we hold that he may sue the initial carrier, together with the connecting carriers over whose lines of road the shipment is routed and the respective liabilities of the parties fixed in that suit." In this case writ of error was denied by the Supreme Court; and as the doctrine therein announced is applicable to the instant case, we think it decisive of the questions here presented, and overrule the first assignment.

The remaining two assignments complain of the insufficiency of the evidence to support the judgment as against the Missouri, Kansas & Texas Railway Co. of Texas. We think the evidence is ample to support the judgment; for which reasons these assignments are overruled.

101 Finding no error in the proceedings of the trial court, the judgment is affirmed.

Affirmed.

B. H. RICE,
Associate Justice.

Filed June 24th, 1914, R. H. Connerly, Clerk of the Court of Civil Appeals, 3rd. Supreme Judicial District, Austin, Texas. R. H. Connerly, Clerk.

Judgment of Court of Civil Appeals, Rendered June 24th, 1914.

No. 5282.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY et al.
vs.
J. H. WARD et al.

Appeal from District Court of Llano County.

Opinion by Associate Justice RICE:

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, J. H. Ward and J. R. Ward, do have and recover of and from the appellants, Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, principals and their surety, American Surety Company of New York, the amounts adjudged against them by the court below and all costs in this behalf expended and this decision be certified below for observance.

Order, Made October 28th, 1914, Overruling Motion for a Rehearing.

Motion 4353: #5282; Missouri, Kansas & Texas Railway Company of Texas et al. vs. J. H. Ward et al. Appeal from Llano County; motion for a rehearing; the motion is overruled.

102 In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

No. 5282.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY et al., Appellants,
vs.
J. H. and J. R. WARD, Appellees.

Appeal from District Court of Llano County.

Motion for Rehearing on Behalf of Appellants.

To said Honorable Court:

Come now Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, Appellants in the above styled and numbered cause, and pray this Honorable court to set aside the judgment and opinion rendered and delivered by this court in said cause on the 24th. day of June, A. D. 1914, affirming the judgment of the trial court, and to grant to appellants a rehearing in said cause, and upon such rehearing to reverse the judgment of the district court and render judgment for appellants, or make such other disposition of the cause as may be proper in the premises; and to that end appellants respectfully represent that this court committed error in each and all the following particulars, to-wit:

103 First Assignment of Error.

The Court of Civil Appeals committed error in overruling and in not sustaining appellants' first assignment of error as set out in page 2 of appellants' brief, reading as follows:

"The court committed error in rendering judgment against the defendants, the Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, because under the pleadings and uncontradicted evidence in said cause, whatever, if any, claim the plaintiffs may have had against said defendants, or either of them, was barred and unenforcible in that the plaintiffs had failed to comply with the stipulations in the bill of lading attached as "Exhibit A" to the first amended original answer of the defendant Missouri, Kansas & Texas Railway Com-

pany of Texas, providing that the shippers s-ould file within thirty days after the happening of the injuries or delays complained of with some freight or station agent of the said defendants, their written and duly verified claim therefor, giving the amount, which provision of said bill of lading was valid and enforcible under the laws of the United States governing and regulating interstate commerce (Tr., 15-16)."

Second Assignment of Error.

The court of Civil Appeals committed error in overruling and in not sustained appellants' second assignment of error as set out in page 4 of appellants' brief, reading as follows:

"The court committed error in rendering judgment against the defendant, Missouri, Kansas & Texas Railway Company of Texas because there was no evidence upon which to base a judgment against said defendant."

Third Assignment of Error.

The Court of Civil Appeals committed error in overruling and in not sustaining appellants' third assignment of error as set out on page 8 of appelants' brief, reading as follows:

"The judgment against the Missouri, Kansas & Texas Railway Company of Texas is against the great weight and pre-
104 ponderance of the testimony, in that, under the great weight and preponderance of the testimony, the evidence is insufficient to base a finding that said defendant was guilty of any act of negligence which directly or indirectly caused or contributed to any injury to the plaintiffs' cattle involved in this suit (No. 4 in Tr. p. 15)."

Fourth Assignment of Error.

The Court of Civil Appeals committed error at all events in holding and ruling in substance and effect that the conditions and stipulations in the bill-of-lading executed by the Missouri, Kansas & Texas Railway Company of Texas, said corporation not being the initial carrier, were not binding upon the appellees, and were void under the Carmack Amendment. Such conditions and stipulations being based upon and in effect a part of tariff provisions, duly filed with the Interstate Commerce Commission, they were the only conditions and stipulations under which the appellants could lawfully handle the shipment.

Fifth Assignment of Error.

The Court of Civil Appeals at all events committed error in its ruling and holding to the effect that the appellants could not avail themselves of the stipulations in the bill-of-lading executed by the appellant Missouri, Kansas & Texas Railway Company of Texas because it affirmatively appears from plaintiffs' petition that the

plaintiffs did not seek to impose any liability on the initial carrier for damage occurring to the shipment involved, other than such as occurred on the line or by reason of the negligence of the initial carrier. And because appellees elected to sue all of the carriers handling said shipment, and in so far as appellees sought to hold these appellants liable in damages arising out of said shipment, appellees waived any rights they had under said Carmack Amendment, and waived the right to insist upon the bill-of-lading executed by the initial carrier as binding upon any of said carriers other than the initial carrier; and the stipulations in the bill-of-lading executed by the said Missouri, Kansas & Texas Rail-
105 way Company of Texas were, therefore, available to the appellants,—in particular the stipulation in regard to notice of damage,—which said stipulation under the uncontradicted evidence, was not complied with, and was reasonable.

Appellants respectfully represent that Hon. F. J. Johnson whose residence and post-office address is Llano, Texas, is attorney of record for the appellees herein.

Respectfully submitted,

(Signed) CHAS. C. HUFF,
" A. H. McKNIGHT,
" FISET, McCLENDON & SHELLY,
Attorneys for Appellants.

Indorsed on back as follows: Witt. App. No. 9103. No. 5282. No. 4353. In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin. Missouri, Kansas & Texas Railway Company et al. Appellants vs. J. H. & J. R. Ward, Appellees. Appeal from the District Court of Llano County. Motion for Rehearing on Behalf of Appellants. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. July 7, 1914. R. H. Connerly, Clerk. Filed in Supreme Court Nov. 28, 1914. F. T. Connerly, Clerk.

In Supreme Court of Texas.

M., K. & T. Ry. Co. of Tex. et al.
vs.
J. H. Ward et al.

From Llano County, Third District.

June 23rd, 1915.

This day came on to be heard the application of M., K. & T. Ry Co. of Tex. et al. for a writ of error to the Court of Civil Appeaks for the Third District and the same having been duly considered, it is ordered that said application be refused. That the applicant-, M., K & T. Ry. Co. and M., K. & T. Ry. Co.
106 of Texas and their surety, American Surety Co. of New York, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby

certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and seal of said Court, this the 30, day of June A. D. 1915.

[SEAL.]

F. T. CONNERLY, *Clerk,*
By H. L. CLAMP, *Deputy.*

Indorsed on back: Application No. 9103. M. K. & T. Ry. Co. of Tex. et al. vs. J. H. Ward et al. Copy of Judgment in Supreme Court. Application for writ of error refused.

Certified Copy Bill of Costs, Supreme Court.

Clerk's Office, Supreme Court.

No. 9103.

M., K. & T. Ry. Co. of Tex. et al.
vs.
J. H. Ward et al.

Filing Application	50¢	Entering Judgment on Application	1 0
Docketing Petition.....	50¢	Certified Copy of Judgment	1.0
Entering Appearance of Counsel	50¢	Taxing Cost of Application	.5
Filing two Briefs.....	60¢	Certified Copy Bill of Costs	1.0
Filing three papers.....	90¢	Filing and Entering Motion	
Entering Orders.....	50¢		
		Total	$7.0

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and seal of said Court, at Austin, this the 30 day of June A. D. 1915.

[SEAL.]

F. T. CONNERLY, *Clerk.*

Indorsed on back: Application. No. 9103. Certified Copy Bill of Costs in Supreme Court, Austin. M. K. & T. Ry. Co. of Texas et al. vs. J. H. Ward, et al. $7.00.

107 In the Supreme Court of the United States.

No. —.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Missouri, Kansas & Texas Railway Company, and American Surety Company of New York, Plaintiffs in Error,

vs.

J. H. WARD, J. R. WARD, and HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, Defendants in Error.

Petition for Writ of Error.

To the Honorable Chief Justice if the Court of Civil Appeals for the Third Supreme Judicial District of Texas:

The petition of the Missouri, Kansas & Texas Railway Company of Texas, Missouri, Kansas & Texas Railway Company and American Surety Company of New York respectfully shows:

J. H. Ward and J. R. Ward sued Houston & Texas Central Railroad Company, the Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company in the District Court of Llano County, Texas, to recover damages in the sum of $2279.00, with interest and costs, for alleged injuries to a shipment of cattle from Llano, State of Texas, to Wynona, State of Oklahoma. The shipment was handled by Houston & Texas Central Railroad Company from Llano to Elgin, Texas, and from Elgin to destination by the other defendants. The Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, among other defenses, averred that a new contract of shipment was entered into at Elgin between plaintiffs and the former, to cover the handling of the cattle from Elgin to Winona, which contract contained the following provision:

108 "The shipper shall, within thirty (30) days after the happening of the injuries or delays complained of, file with some freight or station agent of the carrier on whose line the injuries or delays occurred, his written and duly verified claim therefor, giving the amount. Shipper's failure to comply in time and manner with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries or delays to said live-stock as aforesaid, and no suit shall be brought against any carrier, except against the carrier on whose line the injury or delay occurred, and no damages can be recovered except those set forth in the required written notice and claim aforesaid and in no greater amount than claimed in said notice."

They further averred that plaintiffs failed to comply with such provision, and because of such failure, no recovery could be had. The uncontroverted evidence sustained these allegations. In the face of such pleading and proof, however, the court entered a judgment, May 8, 1913, in favor of plaintiffs against the Missouri,

Kansas & Texas Railway Company of Texas, for $267.50, with interest at six per cent per annum from August 26, 1912, and against Missouri, Kansas & Texas Railway Company for $630.50, with interest at six per cent per annum from August 26, 1912. It was also adjudged that plaintiffs take nothing against Houston & Texas Central Railroad Company.

From this judgment the Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company duly appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and in connection with such appeal executed a supersedeas bond with the American Surety Company of New York as surety. The bond was payable to J. H. Ward, J. R. Ward and Houston & Texas Central Railroad Company, but no appeal was taken from the judgment in favor of the last named defendant in error. Petitioners urged in the Court of Civil Appeals the defense based upon their contract above mentioned,

but such defense was by the said Court of Civil Appeals
109 overruled and on June 24, 1914, it declared the contract void, because in violation of the Carmack Amendment to the Act to Regulate Commerce, and affirmed the Judgment of the trial court. Thereafter a motion for rehearing filed by petitioners in said Court of Civil Appeals was overruled, and the Supreme Court of the State of Texas on June 23, 1915, denied the application of petitioners for a writ of error.

In holding said contract invalid and in affirming the judgment of the trial court, the Court of Civil Appeals, petitioners aver, committed errors to their prejudice, all of which will appear more in detail from the assignment of errors filed with this petition, and denied to petitioners the rights, titles, privileges and immunities specially set up and claimed by them under the constitution and laws of the United States.

The said Court of Civil Appeals is the highest court of the State of Texas in which a decision of this action could be had.

Wherefore, petitioners pray that a writ of error may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of the said Court of Civil Appeals; that a duly authenticated transcript of the recors, proceedings and papers may be sent to the Supreme Court of the United States; and that they have such other and further relief in the premises as may be meet and just, and thus they will ever pray.

(Signed) CHAS. C. HUFF,
" FISET, McCLENDON & SHELLY,
" ALEXANDER H. McKNIGHT,
Attorneys for Plaintiffs in Error.

JOSEPH M. BRYSON,
ALEXANDER H. McKNIGHT,
Of Counsel.

The writ of error prayed for in the foregoing petition is hereby allowed, the same to operate as a supersedeas, and the bond for that

purpose is fixed at the sum of $2500.00, this the 26 day of July A. D. 1915.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

110 Indorsed on back: No. —. In the Supreme Court of the United States. The Missouri, Kansas & Texas Ry. Co. of Texas, Missouri, Kansas & Texas Ry. Co. and American Surety Co. *and American Surety Co.* of New York, Plaintiffs in Error, vs. J. H. Ward, J. R. Ward and Houston & Texas Central R. R. Co., Defendants in Error. Petition for Writ of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin, Texas, July 26, 1915. R. H. Connerly, Clerk.

In the Supreme Court of the United States.

No. —.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Missouri, Kansas & Texas Railway Company, and American Surety Company of New York, Plaintiffs in Error,
vs.
J. H. WARD, J. R. WARD, and HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, Defendants in Error.

Assignment of Errors.

Now comes the Missouri, Kansas & Texas Railway Company of Texas, Missouri, Kansas & Texas Railway Company and American Surety Company of New York, plaintiffs in error in this cause, and make the following assignment of errors, which they aver the Court of Civil Appeals for the Third Supreme Judicial District of Texas committed in the disposition of the case, as shown by the record and proceedings therein:

1.

The court of Civil Appeals erred in holding that the contract issued by the plaintiffs-in-error Railway Companies and accepted by defendants in error, J. H. and J. R. Ward, to cover the movement of the shipment from Elgin, Texas, to Wynona, Oklahoma, was void because in violation of that part of Section 20 of the Act to Regulate Commerce as amended June 29, 1906, known as the Carmack Amendment.

111

2.

The Court of Civil Appeals erred in holding that any claim which defendants in error, J. H. and J. R. Ward, may have ever had against the plaintiffs-in-error Railway Companies was not barred and

rendered unenforcible by their failure to comply with that provision in the contract issued by such plaintiffs in error to cover the movement of the shipment over their lines which requires that notice of the claim be filed with them within thirty days after the happening of the injuries or delays complained of.

3.

The Court of Civil Appeals erred in holding that defendants in error, J. H. and J. R. Ward, did not waive such right as they might have had to require the movement of the shipment through to destination under the contract issued by the initial carrier, Houston & Texas Central Railroad Company, by voluntarily entering into a new contract with plaintiffs-in-error Railway Companies at Elgin, Texas, to cover the movement of the shipment from that point to destination.

4.

The Court of Civil Appeals erred in affirming the judgment of the trial court in favor of defendants in error, J. H. and J. R. Ward, and in entering judgment against plaintiffs in error.

Wherefore, plaintiffs in error pray that the judgment of the said Court of Civil Appeals be reversed and that such judgment be entered by this Court as will grant to them the right to which they are entitled under the constitution and laws of the United States.

(Signed) CHAS. C. HUFF,
" FISET, McCLENDON & SHELLY,
" ALEXANDER H. McKNIGHT,
Attorneys for Plaintiffs in Error.

JOSEPH M. BRYSON,
ALEXANDER H. McKNIGHT,
Of Counsel.

Indorsed on back: No. —. In the Supreme Court of the United States. The Missouri, Kansas & Texas Ry. Co. of Texas, Missouri Kansas & Texas Ry. Co. and American Surety Co. of New York Plaintiffs in Error, vs. J. H. Ward, J. R. Ward and Houston
112 and Texas Central R. R. Co., Defendants in Error. Assignment of Errors. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, July 26, 1915. R. H. Connerly Clerk.

In the Supreme Court of the United States.

No. —.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Missouri, Kansas & Texas Railway Company, and American Surety Company of New York, Plaintiffs in Error,

vs.

J. H. WARD, J. R. WARD, and HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, Defendants in Error.

The above entitled matter coming on to be heard upon the petition of the plaintiffs in error therein for a writ of error from the Supreme Court of the United States to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and upon examination and consideration of said petition and the record in said matter, and desiring to give the plaintiffs in error an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States and that the bond presented by said petitioners be and the same is hereby approved.

W. M. KEY,
Chief Justice of the Court of Civil Apepals for the Third Supreme Judicial District of Texas.

Done this 26th day of July, A. D. 1915.

Indorsed on back: No. —. In the Supreme Court of the United States. The Missouri, Kansas & Texas Ry. Co. of Texas, Missouri, Kansas & Texas Ry. Co. and American Surety Co. of New York, Plaintiffs in Error, vs. J. H. Ward, J. R. Ward and Houston & Texas Central R. R. Co., Defendants in Error. Order Allowing Writ of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial Distrcy Austin, Texas, Jul- 26, 1915. R. H. Connerly, Clerk.

113 In the Supreme Court of the United States.

No. —.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Missouri, Kansas & Texas Railway Company, and American Security Company of New York, Plaintiffs in Error,

vs.

J. H. WARD, J. R. WARD, and HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, Defendants in Error.

Writ of Error Bond.

Know all men by these presents: That we, the Missouri, Kansas & Texas Railway Company of Texas, a corporation chartered and ex-

isting under the laws of the State of Texas, with its principal office in the City of Dallas, Dallas County, Texas; Missouri, Kansas & Texas Railway Company, a corporation, chartered and existing under the laws of the State of Kansas, with its home office in the City of Parsons, Labette County, said State; and American Surety Company of New York, a corporation, chartered and existing under the laws of the State of New York, and having an office and regular place of business in the City of Austin, Travis County, Texas, as principals, and Edward P. Wilmot and Morris Hirshfeld, as sureties, are held and firmly bound unto J. H. Ward, J. R. Ward and Houston & Texas Central Railroad Company, jointly and severally, in the sum of Twenty-five Hundred Dollars ($2500.00), lawful money of the United States of America, to the payment of which well and truly to be made we bind ourselves, our successors and assigns, heirs, executors and administrators, jointly ans severally, firmly by these presents.

Sealed with our seals, and dated, this the 26th day of July, A. D, 1915.

Whereas, in the above entitled cause, the said plaintiffs in error seek to prosecute their writ of error in the Supreme Court
114 of the United States to reverse the judgment rendered in said cause by the Court of Civil Appeals for the Third Supreme Judicial District of Texas in favor of defendants in error, J. H. Ward and J. R. Ward, and against plaintiffs in error,

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of error to effect and answer all damages and costs that may be adjudged if they shall fail to make good their plea, then this obligation to be void; otherwise, to remain in full force and effect.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS AND
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By ALEXANDER H. McKNIGHT,
Their Attorney.
THE AMERICAN SURETY COMPANY OF NEW YORK,
By JAS. E. LUCY, *Agent.*
EDWARD P. WILMOT.
MORRIS HIRSHFELD.

The above and foregoing bond is approved, this the 26 day of July, 1915.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Indorsed on back: No. —. In the Supreme Court of the United States. The Missouri, Kansas & Texas Ry. Co. of Texas, Missouri, Kansas & Texas Ry. Co. and American Surety Co. of New York, Plaintiffs in Error, vs. J. H. Ward, J. R. Ward and Houston & Texas

Central R. R. Co., Defendants in Error. Writ of Error Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jul- 26, 1915. R. H. Connerly, Clerk.

115 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, before you, or some of you, on the 24th day of June, 1914, being the highest court of law or equity of the said State of Texas in which a decision could be had in said suit between The Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company, appellants, vs. J. H. Ward, J. R. Ward and Houston & Texas Central Railroad Company, appellees, wherein titles, rights, privileges and immunities are claimed under the constitution and statutes of the United States and under authority exercised under the United States, and the decision was against titles, rights, privileges and immunities specially set up and claimed by The Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company under such constitution, statutes and authority, a manifest error hath happened to the great damage of the said The Missouri, Kansas & Texas Railway Company of Texas, Missouri, Kansas & Texas Railway Company and of the American Surety Company of New York, surety on the supersedeas bond of said Railway Companies in their appeal from the judgment of the District Court of Llano County, Texas, to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and pro-
116 ceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the aforesaid Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 26th day of

July, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

[Seal of the United States District Court for the Western District of Texas.]

D. H. HART,
Clerk of the District Court of the United States in and for the Western District of Texas.

Allowed as a supersedeas by
W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

117 [Endorsed:] No. —. In the Supreme Court of the United States. The Missouri, Kansas & Texas Ry. Co. of Texas, Missouri, Kansas & Texas Ry. Co., and American Surety Co. of New York, Plaintiffs in Error, vs. J. H. Ward, J. R. Ward and Houston & Texas Central R. R. Co., Defendants in Error. Writ of Error. Filed in Court of Civil Appeals, 3d Supreme Judicial District, Austin, Texas, Jul- 26, 1915. R. H. Connerly, Clerk.

118 UNITED STATES OF AMERICA:

The President of the United States to J. H. Ward, J. R. Ward and Houston & Texas Central Railroad Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas wherein The Missouri, Kansas & Texas Railway Company of Texas, Missouri, Kansas & Texas Railway Company and American Surety Company of New York are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable W. M. Key, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas this the 26 day of July, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Due service of a copy of the above citation is hereby acknowledged and admitted, this the 26 day of July, A. D. 1915.

F. J. JOHNSON,
Attorney for Defendants in Error, J. H. Ward and J. R. Ward.

BAKER, BOTTS, PARKER, GARWOOD,
Attorneys for Defendant in Error, Houston & Texas Central Railroad Company.

119 [Endorsed:] No. —. In the Supreme Court of the United States. The Missouri, Kansas & Texas Ry. Co. of Texas, Missouri, Kansas & Texas Ry. Co. and American Surety Company of New York, Plaintiffs in Error, vs. J. H. Ward, J. R. Ward and Houston & Texas Central R. R. Co., Defendants in Error. Citation in Error. Filed in Court of Civil Appeals, 3d Supreme Judicial District, Austin, Texas, Jul- 30, 1915. R. H. Connerly, Clerk.

120 *Bill of Costs in Court of Civil Appeals.*

No. 5282.

M., K. & T. Ry. Co. et al.
vs.
J. H. Ward et al.

From Llano County.

Affirmed 6/24/14.

Filing Record	.50
Docketing cause	.50
Appearances	1.00
Filing and entering motion	.35
Orders	2.00
Filing 14 extra papers	1.40
Continuances (2)	.40
Judgment	1.00
Taxing costs	.50
Mandate	1.50
Recording Opinion	4.80
Certified copy bill of costs	.75
Certified copy of Orders to Supreme Court, Texas	2.00
Notices (9)	4.50
Copy of Motion	1.50
Issuing 1 precept	1.00
Sheriff's fees, Llano County	1.00
Supreme Court Costs	7.00
Transcript fee to U. S. Sup. Court	60.00
Binding transcript	1.00
Certificate	.50
Total	$93.20

121 *Final Certificate.*

Clerk's Office, Court of Civil Appeals, Austin, Texas.

I, R. H. Connerly, Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas do hereby certify that the foregoing 118 pages contain true and correct copies of all proceed-

ings had in the District Court of Llano County, the Court of Civil Appeals of the said District, the judgment of refusal of the application to the Supreme Court of Texas for a writ of error, its bill of costs and all other proceedings in taking same to the Supreme Court of the United States of America, and to which are attached the writ of error and Citation in error to said Supreme Court of the United States in their originals, in the case in said Court of Civil Appeals numbered 5282, entitled—Missouri, Kansas & Texas Railway Company of Texas, et al., Appellants vs. J. H. Ward, et al., Appellees, lately on appeal to said Court of Civil Appeals from the District Court of Llano County, Texas. Witness my hand and the seal of said court this the 17th day of August, A. D. 1915.

[Seal of the Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

Endorsed on cover: File No. 24,910, Texas, Court of Civil Appeals, 3d Supreme Judicial District. Term No. 241. The Missouri, Kansas & Texas Railway Company of Texas, Missouri, Kansas & Texas Railway Company and American Surety Company of New York, plaintiffs in error, vs. J. H. Ward, J. R. Ward and Houston & Texas Central Railroad Company. Filed Sept. 10, 1915. File No. 24,910.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 241.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiffs in Error,

vs.

J. H. WARD, J. R. WARD and HOUSTON & TEXAS CENTRAL RAILROAD COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES C. HUFF,
ALEXANDER H. McKNIGHT,
C. S. BURG,
Attorneys for Plaintiffs in Error.

JOSEPH M. BRYSON,
ALEX. BRITTON,
Of Counsel.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

SUBJECT-INDEX OF CONTENTS.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 241.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiffs in Error,

vs.

J. H. WARD, J. R. WARD and HOUSTON & TEXAS CENTRAL RAILROAD COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The plaintiffs (defendants in error, J. H. and J. R. Ward) brought this suit in the District Court of Llano County, Texas, to recover from The Missouri, Kansas & Texas Railway Company of Texas, and Missouri,

Kansas & Texas Railway Company, hereinafter called defendants, and Houston & Texas Central Railroad Company, damages on account of alleged delay and rough handling in the shipment of 295 head of cattle from Llano, Texas, to Wynona, Oklahoma, on or about August 23, 1912 (Rec., pp. 1-5). No reference is made in the petition to the law upon which plaintiffs rely for a recovery. It is clear, however, from the fact that all three carriers in the route were sued, that plaintiff did not rely upon the Carmack amendment to the Commerce Act, or the liability of the Houston & Texas Central as the initial carrier. Moreover, even if it be assumed that the shippers were entitled to have their live stock transported to destination under the contract issued by the Houston & Texas Central Railroad, they waived that right when they voluntarily entered into the contract with the intermediate carrier, there being nothing in the Act to Regulate Commerce prohibiting such waiver. It is simply alleged that plaintiffs owned the cattle and delivered them to Houston & Texas Central Railroad Company, at Llano, for shipment to Wynona; that the cattle were routed over the lines of the three companies, which were connecting carriers, via Elgin, Texas, and Denison, Texas, and were transported by Houston & Texas Central Railroad Company from Llano to Elgin, and by defendants from Elgin to Wynona; that in consideration of the through

rate of freight thereupon agreed to be paid, and paid as agreed, it was the duty of the Houston & Texas Central Railroad Company to receive and transport said cattle from Llano to Elgin, with reasonable diligence and ordinary care, and there deliver same to its next connecting carrier, and it in turn became the duty of defendants to receive said cattle at Elgin and transport them to Wynona with reasonable diligence and ordinary care, and there make delivery of same; that defendants, respectively, so agreed and promised to do (Rec., pp. 2-3); and that certain injuries were sustained by the cattle, for which plaintiffs should recover, and for which they prayed judgment in the sum of $2,279.00, with interest and costs, "to be apportioned between the defendants according to their respective liability" (Rec., pp. 4-5).

Judgment was rendered in favor of Houston & Texas Central Railroad Company, of which neither plaintiffs nor defendants make any complaint. It is therefore unnecessary to state the nature of that company's defenses.

The Missouri, Kansas & Texas Railway Company of Texas, among other defenses, plead that a new contract was executed when the cattle were received by it, under which they were transported from Elgin, Texas, to Wynona, Oklahoma; that plaintiffs had a choice of rates in making the shipment, which rates were duly filed with the Interstate Commerce Commission; that

the rate upon which the shipment moved was a special rate, lower than the regular rate for shipments between said points where the carrier assumed general liability (Rec., p. 7); that the contract or bill of lading so executed contains a provision requiring the filing of claim for any injuries or delay to the shipment within thirty days after the happening of the same, and barring a recovery if claim be not so filed; that no claim was filed on the shipment within thirty days after the happening of the alleged injuries; and, therefore, that whatever claim plaintiffs may at any time have had against it was wholly barred (Rec., pp. 7-8). This defendant further averred "that the said shipment constituted and was an interstate shipment, originating in Llano, Llano County, Texas, and destined to Wynona, in the State of Oklahoma, and constituted and was interstate commerce, and the said provisions of said bill of lading were, and are, each and all valid and binding under the laws of Congress relating to interstate commerce in force at the time said bill of lading was executed and said shipment made" (Rec., p. 8).

Missouri, Kansas & Texas Railway Company alleged substantially the same facts as those alleged by The Missouri, Kansas & Texas Railway Company of Texas, except that it averred that it handled the cattle under the contract issued by the latter (Rec., pp. 18-19).

The contract, which was made an exhibit to the answer of each of the defendants, contains the following:

"The Missouri, Kansas & Texas Railway Company of Texas.

"Rules and Regulations for the Transportation of Live Stock.

Notice.

"This Company has two rates and forms of contracts on live stock. Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owners' risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be less than published tariff rate applying thereon when transported at carrier's risk. All kinds of live stock, carrier's risk, will be taken under the provisions and at rates provided for by existing tariffs and classification."

"Special Live Stock Contract No. 66.

"Executed at Elgin, Texas Station, Aug. 23, 1912" (Rec., p. 9).

The only other provision of the contract that need be noticed is section nine, which reads, in part:

"The shipper shall within thirty (30) days after the happening of the injuries or delays complained of file with some freight or station agent of the carrier on whose line the injuries or delays occurred, his written and duly verified claim therefor, giving the amount. Shipper's failure to comply in time and manner with the requirements of

this section shall absolutely defeat and bar any cause of action for any injuries or delays to said live stock as aforesaid, and no suit shall be brought against any carrier, except against the carrier on whose line the injury or delay occurred, and no damages can be recovered except those set forth in the required written notice and claim aforesaid and in no greater amount than claimed in said notice" (Rec., p. 12).

The sufficiency of the evidence to sustain the judgment, if plaintiffs are entitled to recover anything, is not questioned, which renders it unnecessary to make extended reference to the testimony. It is enough to say that the contract plead by defendants was offered in evidence (Rec., p. 38), that it contains the provisions above set out (Rec., pp. 38-42), and that there is no testimony showing the circumstances under which it was executed or indicating any protest on the part of plaintiffs' agent against signing it or questioning his authority to sign it, or explaining the failure of plaintiffs to file claim within thirty days; and to quote the following agreement as to the facts entered into by counsel for the respective parties:

"That no notice, demand or claim was filed with or presented to any of the defendants in this case or their agents except the filing of the suit on the date stated by the file mark, on the 12th of November, 1912. It was further agreed that the facts stated in the answers of the Missouri, Kansas &

Texas Companies are true, that is, that the rates were filed with the Interstate Commerce Commission; that the cattle in question were shipped under a limited liability rate amounting to $63.25 per car; that there was another rate which the shipper had the option of shipping under which was higher than the rate under which they were shipped, but which carried full liability on the part of the carrier'' (Rec., p. 29).

No jury was demanded, and, after hearing the evidence and argument, the Court rendered judgment in favor of Houston & Texas Central Railroad Company, and further adjudged that plaintiffs recover from The Missouri, Kansas & Texas Railway Company of Texas $267.50, with interest and certain costs, and from Missouri, Kansas & Texas Railway Company $630.50, with interest and certain costs (Rec., pp. 19-20). Defendants filed a motion for new trial in the District Court, the first ground of the motion reading:

''The Court committed error in rendering judgment against the defendants, The Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company because under the pleadings and uncontradicted evidence in said cause, whatever, if any, claim the plaintiffs may have had against said defendants, or either of them, was barred and unenforceable in that the plaintiffs had failed to comply with the stipulations in the bill of lading attached as 'Exhibit A' to the First Amended Original Answer of the de-

fendant Missouri, Kansas & Texas Railway Company of Texas, providing that the shippers should file within thirty days after the happening of the injuries or delays complained of with some freight or station agent of the said defendants their written and duly verified claim therefor, giving the amount, which provision of said bill of lading was valid and enforceable under the laws of the United States governing and regulating interstate commerce" (Rec., pp. 21-22).

This motion was overruled (Rec., p. 23), and an appeal was taken by defendants to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, where the aforesaid ground of the motion for a new trial was relied upon to secure a reversal of the judgment. The Court of Civil Appeals, however, overruled the contention and affirmed the judgment (Rec., p. 72). In disposing of the issue, it said:

"The undisputed testimony establishes the fact that this was an interstate shipment; that appellees made the contract with the Houston & Texas Central Railroad Company to transport this shipment from Llano, Texas, to Winona, Oklahoma, over its line and those of its connecting companies; that appellees paid all the freight charges to said first-named company, which was a through rate to be participated in by it and the other two carriers, and received from it a receipt or bill of lading for such through shipment. The undisputed

testimony likewise shows that in this shipment the appellants were the intermediate or connecting carriers, and that the contract containing the stipulations pleaded and set up by appellants was made and executed while said shipment was in course of transportation. Appellees failed to comply with said stipulation, and in fact rely for recovery entirely upon their contract with the Houston & Texas Central Railroad Company. So that the principal question raised by this appeal is that urged in the first assignment, to the effect that the Court erred in rendering judgment against appellants, because under the pleadings and uncontradicted evidence, whatever claim plaintiffs had, if any, against said appellants or either of them, was barred and not enforceable, for the reason that plaintiffs had failed to comply with the stipulation in the bill of lading providing that they should file within 30 days after the happening of the injuries or delays complained of, with some freight or station agent of appellants, their written and duly verified claim therefor, giving the amount, which provision of said bill of lading was valid and enforceable under the laws of the United States governing and regulating interstate commerce.

"Appellees, however, contend, by their counter proposition thereto, that, this being an interstate shipment, the contract of the initial carrier fixes the liability of the parties executing the contract, as well as that of the intermediate and connecting carriers, and under the law such connecting carriers become the agents of the initial carrier, and are charged with the duty of carrying out the con-

tract of their principal, with no right or power to ingraft new conditions or stipulations on the contract already lawfully made and executed, binding them to fully perform their part of the contract of carriers under the terms of said contract; and the trial court did not commit any error in holding that the appellants were bound by such initial contract, and that the contract and stipulations executed and set up by appellants as a defense in this case was an act and attempt to exempt and avoid carrier liability, and was in direct violation of section 20 of the Interstate Commerce Act, generally referred to as the Carmack Amendment, citing in support of such contention the following cases: Atlantic C. L. R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; Kansas City S. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Railway Co. v. Latta, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. 328; Railway Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; Railway Co. v. Harriman Bros., 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Atchison, T. & S. F. Ry. Co. v. Word, 159 S. W. 375; Mo. Pac. Ry. Co. v. Cheek *et al.*, 159 S. W. 427; Pecos & N. T. Ry. Co. v. Meyer, 155 S. W. 309; Chicago, R. I. & P. Ry. Co. v. Scott, 156 S. W. 294.

"A careful reading of the above authorities convinces us of the correctness of appellees' contention. The original Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. Supp. 1911, p. 1288). The amendment

to the twentieth section of said act, known as the Carmack Amendment, reads as follows:

" 'That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof.'

"Mr. Justice Lurton, in Adams Express Co. v. Croninger, *supra*, in passing upon a phase of said case involving this amendment, says:

" 'The significant and dominating features of the amendment are these: First. It affirmatively requires the initial carrier to issue a receipt or bill of lading therefor, when it receives property for

transportation from a point in one state to a point in another. Second. Such initial carrier is made liable to the lawful holder thereof for any loss, damage or injury to such property caused by it. Third. It is also made liable for any loss, damage or injury to such property caused by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass. Fourth. It affirmatively declares that no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.'

"In construing this act the same learned Justice, in Atlantic C. L. R. Co. v. Riverside Mills, *supra*, 219 U. S. at page 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, says:

" 'The indisputable effect of the Carmack Amendment is to hold the initial carrier engaged in interstate commerce and receiving property for transportation from a point in one state to a point in another state as having contracted for a through carriage to the point of destination, using the lines of the connecting carriers as its agents.'

"Again, on page 199 of 219 U. S., page 167 of 31 Sup. Ct. 55, L. Ed. 167, 31 L. R. A. (N. S.) 7, of the above report, the Court said:

" 'Along with this singleness of rate and continuity of carriage, there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier for the purpose of carriage would become the agent of the primary carrier. The

common form of receipt, as the Court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the package might, and usually did, continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the common carriers who in turn had participated in some part of the transportation, he was compelled, in many instances, to make such settlement as should be proposed. This burdensome situation of the shipping public * * * over routes including separate lines of carriers was the matter which Congress undertook to regulate.'

"This Court further says, on page 205 of 219 U. S., page 169 of 31 Sup. Ct., 55 L. Ed. 157, 31 L. R. A. (N. S.) 7:

" 'Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipu-

lation to the contrary, shall be deemed, when it receives property in one state to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence.'

"In Atchison, Topeka & Santa Fe Railway Co. v. Word, *supra*, where a similar question to the one here presented was involved, Mr. Justice Huff of the Amarillo Court of Civil Appeals, said:

" 'If the Fort Worth & Denver Railway Company was a principal in making the contract for the through shipment and received the consideration therefor, the act of the Santa Fe procuring a contract for such shipment over the same route was, as we think, without consideration and contrary to law. It was but the agent of the Denver road, and under the law was charged with the duty of carrying out the contract of its principal, with no right or power to ingraft new conditions and stipulations on the contract already lawfully executed, binding it fully to perform its part of the contract. Stipulations in the contract of the initial carrier were ineffectual in so far as not authorized by the interstate commerce act, whether for its benefit or that of the intermediate carrier. Any provision valid in the initial carrier's contract for its own benefit will therefore enure to the benefit of the connecting carrier'—citing Kansas City S. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

"In that case it is said:

"'The liability of any carrier in the route * * * for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act', citing Adams Express Co. v. Croninger, *supra*, and the other cases relied upon by appellees.

"Concluding, he says:

"'It will be seen from the above authorities that the contract of the initial carrier is one fixing the liability of the parties executing the contract, as well as that of the connecting carrier. It follows that any contract made, or attempted to be made, by the intermediate carrier has no binding effect with reference to the shipment while in the course of transportation. The case of Railway v. Carl, *supra*, appears to be authority for the shipper to sue the intermediate carrier direct (Ry. Co. v. Ray, 127 S. W. 281). And we hold that he may sue the initial carrier, together with the connecting carriers, over whose lines of road the shipment is routed, and the respective liabilities of the parties fixed in that suit.'

"In this case writ of error was denied by the Supreme Court, and, as the doctrine therein announced is applicable to the instant case, we think it decisive of the question here presented, and overrule the first assignment" (Rec., pp. 68-72).

A motion for rehearing was filed by defendants in the Court of Civil Appeals, in which complaint was made of the failure to sustain the assignment of error above quoted (Rec., pp. 73-74). This motion contains the following additional assignments of error:

"Fourth Assignment of Error.

"The Court of Civil Appeals committed error at all events in holding and ruling in substance and effect that the conditions and stipulations in the bill of lading executed by the Missouri, Kansas & Texas Railway Company of Texas, said corporation not being the initial carrier, were not binding upon the appellees, and were void under the Carmack Amendment. Such conditions and stipulations being based upon and in effect a part of tariff provisions, duly filed with the Interstate Commerce Commission, they were the only conditions and stipulations under which the appellants could lawfully handle the shipment" (Rec., p. 74).

"Fifth Assignment of Error.

"The Court of Civil Appeals at all events committed error in its ruling and holding to the effect that the appellants could not avail themselves of the stipulations in the bill of lading executed by the appellant Missouri, Kansas & Texas Railway Company of Texas, because it affirmatively appears from plaintiffs' petition that the plaintiffs did not seek to impose any liability on the initial carrier for damage occurring to the shipment involved, other than such as occurred on the line or by reason of the negligence of the initial carrier. And because appellees elected to sue all of the carriers handling said shipment, and in so far as appellees sought to hold these appellants liable in damages arising out of said shipment, appellees waived any rights they had under said Carmack

Amendment, and waived the right to insist upon the bill of lading executed by the initial carrier as binding upon any of said carriers other than the initial carrier; and the stipulations in the bill of lading executed by the said Missouri, Kansas & Texas Railway Company of Texas were, therefore, available to the appellants—in particular the stipulation in regard to notice of damage—which said stipulation, under the uncontradicted evidence, was not complied with, and was reasonable" (Rec., pp. 74-75).

The motion was overruled and the Supreme Court of Texas refused a writ of error, thus making the judgment of the Court of Civil Appeals final (Rec., pp. 75-76).

Plaintiff in error, American Surety Company of New York, was surety on defendants' appeal bond from the District Court to the Court of Civil Appeals (Rec., pp. 23-24), and is interested in the case only as such surety.

ASSIGNMENT OF ERRORS.

The following errors were assigned in this Court:

"1. The Court of Civil Appeals erred in holding that the contract issued by the plaintiffs in error Railway Companies and accepted by defendants in error, J. H. and J. R. Ward, to cover the movement of the shipment from Elgin, Texas, to Wynona, Oklahoma, was void because in violation of

that part of section 20 of the Act to Regulate Commerce as amended June 29, 1906, known as the Carmack Amendment.

"2. The Court of Civil Appeals erred in holding that any claim which defendants in error, J. H. and J. R. Ward, may have ever had against the plaintiffs in error Railway Companies was not barred and rendered unenforcible by their failure to comply with that provision in the contract issued by such plaintiffs in error to cover the movement of the shipment over their lines which requires that notice of the claim be filed with them within thirty days after the happening of the injuries or delays complained of.

"3. The Court of Civil Appeals erred in holding that defendants in error, J. H. and J. R. Ward, did not waive such right as they might have had to require the movement of the shipment through to destination under the contract issued by the initial carrier, Houston & Texas Central Railroad Company, by voluntarily entering into a new contract with plaintiffs in error Railway Companies at Elgin, Texas, to cover the movement of the shipment from that point to destination.

"4. The Court of Civil Appeals erred in affirming the judgment of the trial court in favor of defendants in error, J. H. and J. R. Ward, and in entering judgment against plaintiffs in error" (Rec., pp. 79-80).

BRIEF OF ARGUMENT.

The Carmack Amendment reads as follows:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.
>
> "That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

It is settled by the decisions of this Court that the failure of plaintiffs to give notice of their claim as re-

quired by the live stock contract would bar a recovery if defendants were the initial carrier (Missouri, Kansas & Texas Ry. Co. v. Harriman, 227 U. S. 657; Northern Pacific Ry. Co. v. Wall, 241 U. S. 87; Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190; Chesapeake & Ohio Ry. Co. v. McLaughlin, 37 Supreme Court Reporter 40).

In Missouri, Kansas & Texas Ry. Co. v. Harriman, the Court, in discussing a provision of a live stock contract requiring suit within 91 days, said (672):

> "The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the Court. Such stipulations have been sustained in insurance policies. (Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386.) A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in Express Company v. Caldwell, 21 Wall. 264. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. We cite a few: Central Vermont Railroad v. Soper (1st C. C. A.), 59 Fed. Rep. 879; Ginn v. Ogdensburg Transit Co. (7th C. C. A.), 85 Fed.

Rep. 985; Cox v. Central Vermont Railroad, 170 Massachusetts 129; North British, Etc., Insurance Co. v. Central Vermont Railroad, 9 App. Div. (N. Y.) 4, affirmed 158 N. W. 726. Before the Texas and Missouri statutes forbidding such special contracts, short limitations in bills of lading were held to be valid and enforceable (McCarty v. Gulf, Etc., Ry., 79 Texas 33; Thompson v. Chicago, Etc., Ry., 22 Mo. App. 321). See cases to same effect cited in 6 Cyc, p. 508. The provision requiring suit to be brought within ninety days is not unreasonable."

In Northern Pacific Ry. Co. v. Wall, *supra*, the bill of lading required notice in writing of the claim before moving the cattle from the place of destination or mingling them with other live stock. The provision was held valid and the Court reversed the judgment because the State Court failed to give it proper effect.

In Georgia, Florida & Alabama Ry. Co. v. Blish Milling Company, *supra*, the railway company urged as a defense the failure of plaintiff to comply with the following provision of the bill of lading:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

The provision was held valid, but the Court affirmed the judgment against the railway company because it concluded that the provision had been complied with.

With respect to the wisdom and legality of the provision, the Court said (195):

> "The transactions of a railroad company are multitudinous and are carried on through numerous employes of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

The following is from Chesapeake & Ohio Ry. Co. v. McLaughlin, *supra*:

> "The shipment was under a 'uniform live stock contract' signed by both parties and introduced in evidence by defendant in error which, among other things, provides:
>
> " 'That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any Court by the said shipper, unless claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent

and delivered to the General Claim Agent of the said carrier at his office in Richmond, Va., within five days from the time said stock is removed from said car or cars; and that if any loss or damages occur upon the line of a connecting carrier then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs.'

"It conclusively appears that McLaughlin did not present a verified claim to the carrier's agent as provided by the contract. Upon its face the agreement seems to be unobjectionable and nothing in the record tends to establish circumstances rendering it invalid or excuse failure to comply therewith. The Court below erred in denying a seasonable request for a directed verdict, and its judgment must be reversed."

The same cases sustain the broader proposition that the claim provision of the contract is valid, if not made unlawful by the Carmack Amendment.

The sole question for determination then is, whether the Carmack Amendment prohibits the making of contracts by connecting carriers limiting the time for filing claims against them under the facts of this case or renders their efforts to so contract ineffectual.

The conditions which brought about the passage of this Act are thus stated by the Court in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186 (199):

"Along with this singleness of rate and con-

tinuity of carriage there grew up the practice of receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier for the purpose of carriage would become the agent of the primary carrier. The common form of receipt, as the Court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might, and usually did, continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the connecting carriers who in turn had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

"This burdensome situation of the shipping public in reference to interstate shipments over

routes including separate lines of carriers was the matter which Congress undertook to regulate."

The aim of the law, the Court has said, was to establish unity of responsibility for loss and damage (Atlantic Coast Line v. Riverside Mills, 219 U. S. 186; New York, Philadelphia & Norfolk R. R. Co. v. Peninsula Produce Exchange of Maryland, 240 U. S. 34; Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190).

Everything that is comprehended within the evil sought to be remedied or the aim of the enactment should be held to come under the prohibition of the law, but nothing beyond such evil or aim should be read into the Act, unless the language used by Congress requires it.

The Amendment requires the initial carrier to issue a receipt or bill of lading, but there is nothing in it expressly stating that such instrument shall be a through contract. There is certainly nothing in the wording of the amendment which refers expressly to the initial common carrier or that expressly prohibits the issuance of a bill of lading by an intermediate carrier.

While the Court stated in Northern Pacific Ry. Co. v. Wall, 241 U. S. 87, 92, that the statute directs the initial carrier "to issue a through bill of lading therefor", and in Georgia, Florida & Alabama Ry. Co. v.

Blish Milling Company, 241 U. S. 190, 196, "As we have said, the latter (the connecting carrier) takes the goods under the bill of lading issued by the initial carrier and its obligations are measured by its terms", citing Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, and Southern Ry. Co. v. Prescott, 240 U. S. 632— those statements do not foreclose the question, for in neither case had a second contract been issued, and therefore the validity of a connecting carrier's contract was not before the Court.

We find nothing in the evil that Congress sought to remedy or the purpose it intended to accomplish that conflicts with the right of a connecting carrier to require the shipper to enter into a reasonable contract with it to cover the movement of a shipment over its line. There may be unity of responsibility although there are as many contracts as there are carriers handling the shipment. The making of separate contracts does not mean that the liability of the initial carrier is limited to its own line or that the shipper must proceed against the carrier on whose line the loss or damage occurred. It simply means that whether there is any liability or not must be determined by the lawful provisions of all the contracts, and not by the lawful provisions of the initial carrier's contract only. There is a clear distinction between stating that, whatever the liability, recovery may be had against the initial carrier for it, and that liability must be determined by

the contract of the initial carrier alone. Congress has said the former, but not the latter.

In determining liability, pertinent tariff provisions must be considered. That is clear. The Court said in Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184 (197): "The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, par. 2; March 2, 1889, 25 Stat. 855, c. 382, par. 6; Armour Co. v. United States, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike." And, in ruling on the refusal of the trial court to permit the introduction of tariff provisions, the court said in Southern Express Co. v. Byers, 240 U. S. 612, 614: "In order to determine the validity and effect of restrictions upon liability contained in such bills, it is important, if not indeed essential, to consider the applicable schedules on file with the Commission", citing Adams Express Co. v. Croninger, 226 U. S. 491; C., B. & Q. Ry. v. Miller, 226 U. S. 513; C., St. P., M. & O. Ry. v. Latta, 226 U. S. 519; Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469; Kansas City Southern Ry. v. Carl, 227 U. S. 639; Mo., Kans. & Tex. Ry. v. Harriman,

227 U. S. 657; Chicago, R. I. & Pac. Ry. v. Cramer, 232 U. S. 490; Boston & Maine R. R. v. Hooker, 233 U. S. 97; Pierce Co. v. Wells, Fargo & Co., 236 U. S. 278; N. Y. & Norfolk R. R. v. Peninsula Exchange, 240 U. S. 34. Now, suppose, as might well be the case where a shipment moves over a route to which no through rate is applicable, three carriers are involved and each has different regulations governing liability in its tariffs on file with the Commission. In such case, no matter what provisions the contract issued by the initial carrier may contain, the liability is affected, not only by the contract provisions, but by the tariff regulations of the second and third carriers, and in case of a conflict between the provisions of the contract and the tariff regulations, the latter will control.

As illustrative of this, we call attention to Glenlyon Dye Works v. Interstate Express Co. *et al.*, 91 Atlantic Reporter 5. There the shipment was handled by two carriers. The first carrier issued a contract, which, however, contained no provision limiting liability to any specified amount, nor was there any such provision in its tariffs so far as the record shows. But the connecting carrier had a tariff provision grading its rates according to the value of the shipment and limiting its liability to $50.00 per shipment, in case no higher value was declared. The loss was sustained on the line of this carrier. The Supreme Court of Rhode Island sustained the provision and limited plaintiff's recovery

against the initial carrier to $150.00, there being three shipments, although the shipments were worth more than $2,500.00, and that amount might have been recovered had the loss happened on the line of the initial carrier.

If the plaintiffs in error had waived the failure to file a claim and had paid the claim voluntarily, they would have been guilty of a discrimination in favor of defendants in error under the doctrine of Phillips v. Grand Trunk Ry., 241 U. S. 662 (667), and for the courts to enforce payment would likewise constitute a discrimination in their favor.

The object, we submit, was not to secure uniformity of liability on all lines, but, as this Court said in Kansas City Southern Ry. Co. v. Carl, 227 U. S. 649, to withdraw the question of liability on interstate shipments from the influence of state regulation and to bring it under Federal rule or law, with the right on the part of the shipper to recover his whole damages from the initial carrier.

The object thus stated is no more interfered with by requiring a separate contract to cover the movement over each line than by having the liability of each carrier governed by different tariff regulations. Congress has so signally failed to prevent the latter, when it could easily have been prohibited, that we must conclude it did not intend to prevent it; and, with respect to the other, the only reasonable inference

is, that if it had meant to prohibit separate contracts, which, as the Court may judicially know, were customarily required in the transportation of live stock, language much more appropriate to the accomplishment of that end would have been used.

The strength of our case, however, does not lie alone in the construction of the Carmack Amendment for which we contend. If it be conceded that under the amendment the shipper has a right to insist that his goods move to destination under the original contract, clearly the right is not one that he must insist upon. There is nothing in the policy of the law that would prevent its being waived. And it is waived when the shipper, at the end of the initial carrier's line, voluntarily enters into a new contract with the first connecting carrier to cover the movement from that point to destination.

That is precisely the case here. While the record does not show the circumstances under which defendants' contract was executed, there is no presumption that it was obtained by fraud or duress or that there was any other fact attending its execution that would render it invalid. Upon the contrary, the carrier is entitled to the presumption that it is conducting its business lawfully (N. Y. C. & H. R. Co. v. Beaham, 37 Sup. Ct. Rptr. 43). The contract, therefore, will be presumed to be valid until the contrary is shown, and, in the state of the record, it must be treated as a contract

voluntarily entered into between plaintiffs and defendants. We see no reason to doubt its validity when so considered.

Wherefore, defendants pray that the judgment of the State Court be reversed, and that the cause be remanded for disposition in accordance with the foregoing views.

Respectfully submitted,

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Of Counsel.

ditions can not be introduced by a connecting carrier through a second bill of lading.

Without there being any break in the transportation or readjustment of rates, a connecting carrier issued a second bill of lading containing a stipulation, not in the original bill, by which its liability for damages was made conditional on service of a written claim within a certain time. *Held*, that the shipper's acceptance of the new bill was without effect upon the rights of the parties.

Under the Carmack Amendment, acceptance by the shipper without consideration of a second bill of lading governing a part of the through transportation and which contains new terms more favorable to the carrier is without effect.

169 S. W. Rep. 1035, affirmed.

THE case is stated in the opinion.

Mr. Alexander Britton, Mr. Joseph M. Bryson, Mr. Charles C. Huff, Mr. Alexander H. McKnight and *Mr. C. S. Burg* for plaintiffs in error.

No appearance for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is an action to recover damages for injuries to cattle in the course of an interstate shipment. The cattle were delivered on August 23, 1912, by J. R. Ward to the Houston and Texas Central Railroad Company at Llano, Texas, for transportation by it to Elgin, Texas, and over connecting lines, the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company, to Winona, Oklahoma. The Houston Company issued a through bill of lading in the form of the "live stock contract" in common use, and charged a through rate, which was paid by the shipper as agreed. The cattle arrived at destination in a crippled and debilitated condition, alleged to have resulted from the

delay, rough handling, and other negligence of the carriers. Plaintiffs brought this suit for damages in the District Court for Llano County, joining the three carriers as defendants. The petition contained no reference to the Carmack Amendment (June 29, 1906, c. 3591, 34 Stat. 584, 595).[1] The Houston Company answered, setting up a provision in the bill of lading limiting liability to injuries occurring on its own line; and alleging that the cattle were transported to Elgin with ordinary care and there delivered in good condition to the connecting carrier. The Missouri, Kansas & Texas Railway Company of Texas, in its answer, denied the allegations of the complaint and, in addition, alleged that it had accepted the cattle at Elgin under a second bill of lading or live stock contract, executed by it and by one E. A. Barrer, as agent of the shipper; that the plaintiff had failed to comply with a stipulation therein, requiring, as a condition precedent to liability, that a written claim for damages be filed within thirty days after the happening of the injuries complained of; and that "the said shipment constituted and was an interstate shipment, originating in Llano, Llano County, Texas, and destined to Wynona, in the State of Oklahoma, . . . and the said provisions of said bill of lading were and are, each and all valid and binding upon [under?] the laws of Congress relating to interstate commerce in force at the time said bill of lading was executed and said shipment made."

The record is silent as to the circumstances under which this second bill of lading was executed; and although it is alleged to have been issued in consideration of a special reduced rate theretofore duly filed with the Interstate Commerce Commission, there is nothing to indicate that it affected the through rate already agreed upon in

[1] The rights of the parties are not affected by the Act of March 4, 1915, c. 176, 38 Stat. 1196, dispensing with the necessity of notice of claim in certain cases.

the original bill of lading. This lower rate referred to appears to have been merely the customary special rate offered in consideration of an agreed maximum valuation on the cattle per head. The same agreed value was stipulated in the original bill of lading, which expressly "limits the liability of carriers in consideration of a lower rate being granted." The Missouri, Kansas & Texas Railway Company set up the same defense, alleging that it had accepted the shipment under the second bill of lading.

A jury trial having been waived, the case was heard by the court, and judgment rendered in favor of the Houston Company, but against the other two defendants in amounts which were found to represent the damage suffered in the course of the transportation through the negligence of their respective agents. Upon appeal by these defendants, the Court of Civil Appeals of the Third Supreme Judicial District affirmed the judgment, on the ground that the liability of the connecting carriers must be governed by the provisions of the bill of lading issued by the initial carrier (which did not require a written claim in thirty days) and that the second bill of lading was void under the Carmack Amendment. 169 S. W. Rep. 1035. Upon denial of a petition for rehearing the case was brought here on writ of error.

The purpose of the Carmack Amendment has been frequently considered by this court.[1] It was to create in the initial carrier unity of responsibility for the transportation to destination. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186; *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87, 92. And provisions in the bill of

[1] *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592.

lading inconsistent with that liability are void. *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading.[1] The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void.

The Railway Companies contend that while the Carmack Amendment makes the receiving carriers pay for all liability incurred by the connecting lines, the question of whether there is any such liability or not must be determined by reference to the separate contracts of each participating carrier, and not to the contract of the initial carrier alone. If, as contended, a shipper must, in order to recover, first file his "verified claim" with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still rest under the burden of determining which of the several successive carriers was at fault. Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task, of determining on which of the several connecting lines the damage occurred. For the purpose of fixing the liability, the several carriers must

[1] *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 194, 196; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 648. See also *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588.

be treated, not as independent contracting parties, but as one system; and the connecting lines become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, 203; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace*, 223 U. S. 481, 491.

The Railway Companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore as stated in *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, "the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act. . . . A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

Judgment affirmed.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS ET AL. *v.* WARD ET AL., AND HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

ERROR TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 241. Submitted April 30, 1917.—Decided June 4, 1917.

Under the Carmack Amendment, the bill of lading issued by the initial carrier governs the entire transportation; the liability of each participating carrier is fixed by its valid, applicable terms; and new con-